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May 1999

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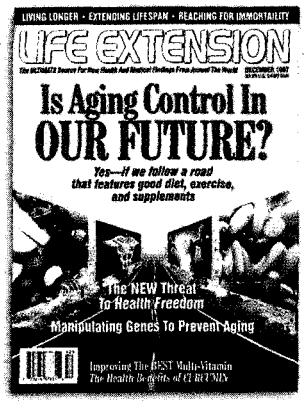
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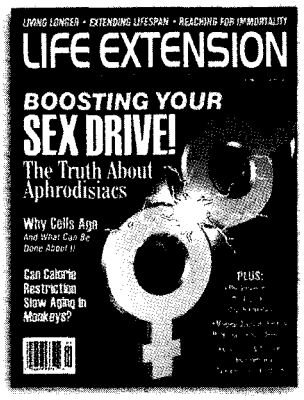
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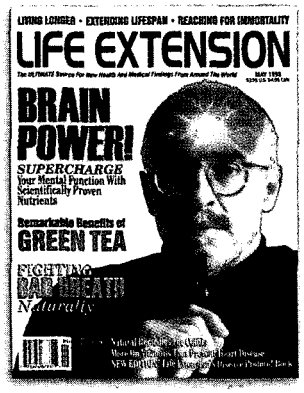


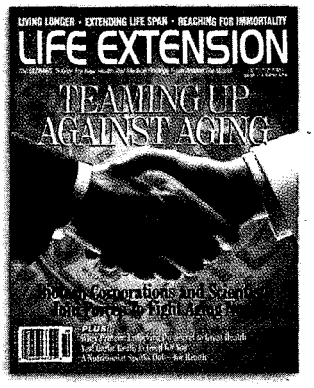


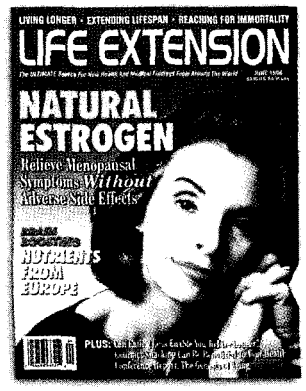
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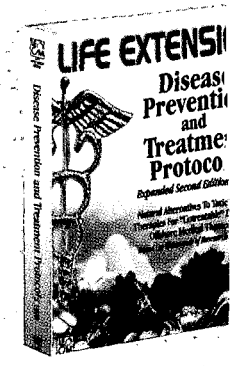


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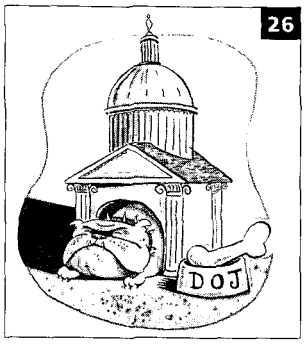

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*Cover illustration: David Klug*

**REASON** (ISSN 0048-6906) is published monthly except combined August/September issue by the Reason Foundation, a nonprofit, tax-exempt organization, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034-6064. Periodicals postage paid at Los Angeles, CA, and additional mailing offices. Copyright© 1999 by Reason Foundation. All rights reserved. Reproduction or use, without permission, of editorial or graphic content is prohibited. Reason and Free Minds and Free Markets are registered trademarks owned by the Reason Foundation. **SUBSCRIPTIONS:** $26 per year. Outside U.S. add $8/year surface, $55/year airmail. Address subscription correspondence to Reason, P.O. Box 526, Mt. Morris, IL 61054, 815-734-1102. For address change (allow six weeks), provide old address and new address, including zip code. **UNSOLICITED MANUSCRIPTS** returned only if accompanied by SASE. **INDEXED** in Readers' Guide to Periodical Literature, InfoTrac, Historical Abstracts, Political Science Abstracts, America: History and Life, Book Review Index, and P.A.I.S. Bulletin. Available on microfilm from University Microfilms International, 300 North Zeeb Rd., Dept. P.R., Ann Arbor, MI 48106. **Printed in the United States. POSTMASTER:** Send address changes to Reason, P.O. Box 526, Mt. Morris, IL 61054. Publications Mail Sales Agreement No. 1476696.

# Source Code

## Al Gore says he invented the Internet. What does he mean?

By Virginia Postrel

It was a gaffe worthy of Dan Quayle, but with Clinton-style grandiosity. In a March 10 interview with Wolf Blitzer of CNN, Al Gore bragged about his record. "During my service in the United States Congress," he said, "I took the initiative in creating the Internet."

Wow. Al not only writes turgid environmentalist tomes, he also writes computer code. He created the Internet. What a 21st-century guy!

By the next day, the ridicule was flying—mostly through Gore's supposed brainchild. Declan McCullagh broke the story in the online *Wired News* and his Politech e-mail news service, pointing out that Gore was just 21 years old when the Defense Department commissioned the original ARPANET in 1969. By the time Gore got to Congress in 1977, wrote McCullagh, "Email was flourishing. The culture of the Internet was starting to develop through the Jargon File and the SF-Lovers mailing list."

Republicans jumped to mock the veep. "If the Vice President created the Internet, then I created the Interstate highway system," said Dick Armey, the House majority leader. Senate Majority Leader Trent Lott, a notorious neatnik, claimed to have invented the paper clip. Lott's press release included his supposed early designs and a final version dated April Fool's Day, 1973.

But Al Gore was not lying to Blitzer. The vice president almost certainly believes that he "took the initiative in creating the Internet." His claim reflects a particular understanding of the world and of recent technological history. As such, it reveals more than mere grandiosity and spin.

To understand Gore's bizarre boast, you have to know a lot of details about the history of the Internet. It's not enough to say that ARPANET started in 1969. A self-contained network for Defense Department researchers would be of interest only to military historians and a few techno-geeks. The Internet grew beyond ARPANET because of two related developments.

First, the Internet community developed the underlying programs—the "protocols" known as TCP/IP—that allow wildly different computers to communicate with each other. This programming infrastructure was what let "the Internet" evolve to encompass a bunch of independent networks, both public and private. TCP/IP's creators wisely left those protocols very generic, enabling future innovators to build other structures, including those that made the World Wide Web possible, on top of them. ARPANET itself converted to TCP/IP in 1983.

Second, in 1985 the National Science Foundation agreed to fund a "backbone" network among five supercomputer sites. Academic institutions could connect to the backbone if they organized regional networks of their own; the NSF provided two-year grants to cover the regional networks' startup expenses, after which universities paid their own way. Combined with the communications power of TCP/IP, this NSFNet boosted the number of interconnected computers to critical mass. It displaced ARPANET as the driving force in the development of a worldwide network of interlinked computers.

In this important sense, "the Internet" dates not to 1969 but to the early 1980s. Gore enters the picture a bit later—in 1987, when he supported a drive by universities to expand funding for NSFNet. That drive became law in the High Performance Computing Act of 1991, which gave about $1 billion to high-performance networks and computers; about $150 million of the funding was new money, with the rest consolidated from other programs.

"Gore gets credit for cheerleading on networking from '87 on, and for getting the agencies to get off their behinds and coordinate things a bit," says Mike Roberts, who lobbied for NSFNet funding as vice president of networking at Educom, an association of universities. "But [he's] not exactly the father of the Internet."

So Gore was there in 1987, long before most politicians had any notion that the Net existed. But the basics—the software and hardware infrastructure on which the Internet grew—were already in place. His "initiative" (which wasn't actually his idea) may have speeded its development a tad, but Gore's work did not create the Internet.

Yet the vice president thinks it did, and Blitzer, a top political reporter, saw no reason to question his boast. It's as though an important technological development does not really exist until it has been ratified by lavish subsidies and an act of Congress—until it has come to the official attention of people like Sen. Albert Gore Jr. "Creating" the Internet from Capitol Hill means ignoring the incremental, relatively small-scale way it really evolved, as well as the unsung people who developed it.

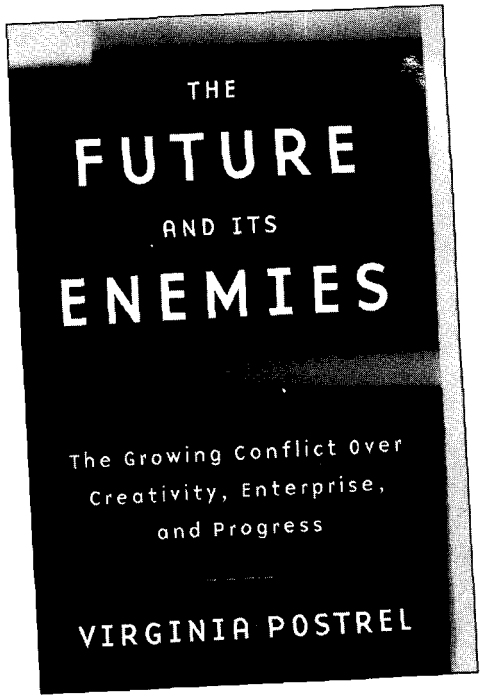
The Internet unquestionably began as a government program, a tool first for Defense Department researchers and then for scientists elsewhere. Its early development was paid for with tax dollars (in much more modest sums than Gore's later largess). But the Internet's gradual, open-ended development bears little resemblance to the grand schemes that move the vice president's technocratic imagination.

The Net worked because it fit into the technological ecology. It began modestly, as a way of connecting specific researchers, not a vehicle to remake the economy. It did not, therefore, create big distortions in science, business, or technology, or suck huge portions of the total funds available into one giant project—à la the Superconducting Supercollider or the space shuttle. The people involved knew each other and the problems at hand, and they proceeded incrementally.

They also had the wisdom to interpret the charge to "communicate" in an open-ended way. They adopted technical stan-

# "Brilliant"

—James K. Glassman, *The Washington Post*

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REASON
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**President and Publisher** Robert W. Poole Jr. *(bobp@reason.com)*

**Editor** Virginia Postrel *(vpostrel@reason.com)*
**Executive Editor** Nick Gillespie *(gillespie@reason.com)*
**Senior Editors**
Charles Paul Freund *(cpf@reason.com)*
Jacob Sullum *(jsullum@reason.com)*
**Associate Editor** Jesse Walker *(jwalker@reason.com)*
**Washington Editor** Michael W. Lynch *(mlynch@reasondc.org)*
**Assistant Managing Editor** Mariel Garza *(mariel@reason.com)*
**Science Correspondent** Ronald Bailey *(rbailey@reason.com)*
**Editorial Assistants** Robert Honrado, Mary Toledo
**Intern** Ryan H. Sager
**Art Director** Barb Burch *(bburch@reason.com)*
**Webmaster** Brian J. Taylor *(webmaster@reason.com)*
***Reason Express* Writer** Jeff A. Taylor *(jtaylor@reason.com)*
**Contributing Editors**
Gregory Benford, James V. DeLong, Edith Efron, Glenn Garvin, Steven Hayward, Thomas W. Hazlett, David R. Henderson, John Hood, Brink Lindsey, Carolyn Lochhead, Loren E. Lomasky, John McClaughry, Deirdre N. McCloskey, Michael McMenamin, John J. Miller, Charles Oliver, Walter Olson, John J. Pitney Jr., Thomas Szasz, Frederick Turner, Martin Morse Wooster, Cathy Young
**Cartoonists**
Chip Bok, Henry Payne, Scott Stantis

**Public Affairs Director** Mike Alissi *(malissi@reason.com)*
**Circulation Director** Alyssa Garey *(agarey@reason.com)*
**Assistant Publisher** Michael Orendy *(michaelo@reason.com)*
**Volunteer** Anthony Brown
**Legal Adviser** Don Erik Franzen

**Editorial and Production Offices**
3415 S. Sepulveda Blvd., Suite 400
Los Angeles, CA 90034-6064
310-391-2245 Fax: 310-391-4395
*(letters@reason.com)*
*(permissions@reason.com)*
**Washington Office**
1717 Pennsylvania Ave., NW, Suite 260
Washington, DC 20006
202-955-1324 Fax: 202-955-3187
**Advertising Sales**
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Bethesda, MD 20814
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*(ads@reason.com)*
**Circulation Service**
P.O. Box 526, Mt. Morris, IL 61054
1-888-REASON-8 (1-888-732-7668)
*(subscribe@reason.com)*

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dards that enabled ideas no one had yet thought of—from e-mail to the Web—to be added to the network later. And they let different standards compete for dominance, rather than picking a winner in advance.

The Internet thus evolved from the bottom up. It was not designed by a committee of experts as a perfect system whose every use was anticipated in advance. Rather, it was improved over time, through trial and error, collaboration and competition. As a result, the Net became a model of spontaneous order and decentralized governance—of the way simple, underlying rules can permit enormous creativity and complexity. This dynamic, open-ended vision does not fit easily with the technocratic models that dominate the political world.

The history of the Net thus captures a tension in contemporary American life: Government is so pervasive that almost every development, positive or negative, can be tied in some way to government—to subsidies, to tax-code distortions, to regulations. Politicians can claim credit for innovations they did little to create; people who want an even more activist government can point to those same inventions as evidence that government is just dandy; and pork-seeking industries can claim that subsidies and tax credits will make America rich. (Silicon Valley is now demanding that the federal government double spending on research and development.)

The history of the Internet is not, as some people have tried to make it, a libertarian just-so story. It is a messy tale in which the government played a significant role. That role was, however, far more subtle than the plans of industrial policy gurus or techno-boosting politicians.

In fact, we have a pretty good example of what sort of Internet we would have gotten if Al Gore, or someone like him, had created an "information superhighway" on his own initiative. It's called Minitel—the French state phone company's system of terminals. In true French fashion, Minitel was grand, comprehensive, and carefully planned. It was state-of-the-art in the mid-1980s. And it has barely changed since then. ◆

# Southern Gothic

## The price of presidential prevarication

By Nick Gillespie

It has become clear that the Clinton era's twilight years will be a gloomy dusk, filled with the whispering of ghosts and the casting of unsettling shadows. The Juanita Broaddrick rape charge—uncomfortably credible and insufficiently countered not merely by the president's lawyer but, more disturbingly, by his friends and political allies—casts a pall over a White House that has not wanted for dark clouds. As with the debunked story of his fathering a prostitute's child, that the president's supporters plainly see him as capable of such an act, if not necessarily guilty in this particular instance, is to damn the man as fully as his most vociferous enemies.

When Bill Clinton took office six years ago, there was something of the atmosphere that surrounded Andrew Jackson's triumphant arrival in Washington, D.C., in 1829: Here was a new kind of politician, both regionally and ideologically, a figure from the western, rough-and-tumble fringes of the South, a man of humble roots who claimed a strong emotional and experiential bond to the common people, a leader who would inaugurate a new age in national politics. Charged with ushering in the next American century, Clinton would not only oversee the "most ethical administration" ever (an unintentionally ironic boast, that), but would fundamentally restructure government and American life for the better.

But he has succeeded in nothing so much as transforming the White House from a symbol of august leadership and

sober authority into a decaying Southern manse out of the pages of Poe, Faulkner, and Tennessee Williams. Famously raised in a dysfunctional family—the story of how young Billy stared down his alcoholic, physically abusive stepfather was early on made part of his legend—Clinton has himself emerged as a passive-aggressive national patriarch who alternates between fits of angry, finger-waving indignation and dew-eyed, lip-biting confessions before announcing that, starting tomorrow, he will be a changed man.

In an age of arch cynicism toward politics and politicians, he has distinguished himself as so thoroughly Machiavellian that it is universally acknowledged that his own word in the Broaddrick matter is worthless. In a way that was unthinkable before his presidency, we are left puzzling over the subtext and latent meaning of every utterance the chief executive makes and every action he takes, whether the topic is sexual harassment or the bombing of foreign countries.

The pattern of prevarication and half-truths, of course, has been in place even before the president took office, and it has never been restricted to arguably personal matters: While candidate Clinton gave halting, patently insincere, and predictably evolving accounts of his relationship with Gennifer Flowers (and the use of state troopers in facilitating the affair), he did the same regarding his draft experience and experimentation with drugs.

Again and again, we have been asked to believe *this* today ("I did not have sexual relations with that woman, Miss Lewinsky") and *that* tomorrow ("Indeed, I did have a relationship with Ms. Lewinsky") without concluding that the man is a moral impostor.

There is a policy analogue as well. To pick one example from many: After campaigning on a refreshingly open and inclusive attitude toward gays and lesbians, Clinton later—and with minimal arm-twisting—signed into law the Defense of Marriage Act, the most blatantly homophobic piece of legislation passed in recent years.

Before the Broaddrick charges were at last aired publicly, the chattering classes were preoccupied with musing over the implications of the impeachment proceedings for Bill Clinton's "legacy" and for his final years in office. Now such talk has receded, as if these most serious accusations are simply too monstrous to contemplate. Analysts, politicians, and—most bizarre of all—feminist leaders have urged that we must "move on" and "get back to the business of running the country." The charges are, they say, too old to prove one way or another, and they tremble at putting a simple, unequivocal question before the president.

If Clinton has become an abusive father, they have become his whipped wife and children, eager to repress ugly and uncomfortable fears—not simply about Broaddrick but about all the values and ideals which the president claims to hold. He wanders the public landscape, ever present and central to our lives, but a distant uncommunicative figure nonetheless. If anything, his same-as-before utterings on policy matters—a few days after the Broaddrick interview on *Dateline* aired, he triumphantly announced guidelines for a universal attachment mechanism for children's car seats—only to serve to draw attention to the wall of unspoken words between him and the nation he governs.

The result is an unreal atmosphere that is both dumbfounding and paralyzing: If our leader is indeed capable of rape and left in office—if our leader is credibly charged with rape and never makes a full accounting of himself—what sort of moral order in America is possible?

In the end, Clinton will exit our lives. We will move on from the psychodrama in which he has enmeshed us. But how we do so—repressing the memory until it fades to dullness or confronting it and working toward some definitive sense of what, if anything, happened between Broaddrick and Clinton—will speak volumes about our own moral lives and how long the episode haunts our country. ◆

## REASON NEWS

■ We are delighted to announce that Nick Gillespie has been promoted to executive editor. Nick joined REASON in October 1993 as an assistant editor and was most recently a senior editor.

■ REASON Washington interns Ryan Sager and Jason Brooks dominated the competition in this year's Felix Morley Memorial Journalism Competition, sponsored by the Institute for Humane Studies. The Morley prizes honor young journalists writing in the classical liberal tradition. Sager, our current intern and a sophomore at George Washington University majoring in history and economics, took the top prize. Brooks, a student at Carleton University in Ottawa, placed third in the contest. He worked in REASON's Washington office last summer as a Charles Koch Foundation intern.

■ Congratulations to Deroy Murdock, who was recently honored for his REASON column, "Numbers Game" (October 1998), which reported on North Carolina's attempts to shut down a charter school because it enrolled "too many" black students. The National Association of Secondary School Principals selected Deroy's column for an honorable mention in its Benjamin Fine Awards for Outstanding Education Reporting.

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## Mars: Fact or Folly?

After reading John Tierney's "Martian Chronicle" (February), I was reminded that extraterrestrial libertarian millenarianism is not a new phenomenon. In the early 1970s, an organization called the International Society of Free Space Colonizers arose in Seattle committed to the colonization of the asteroids by the 1990s as a decisive act of liberation by the "creator class."

Fortunately, Robert Zubrin has a credibility that these earlier enthusiasts lacked. However, I think he substantially discounts the necessary technological and economic dependence of any interplanetary colonization program on earthly civilization—not to mention the currently insuperable level of government regulation over transport to and from outer space. As appealing as his colonization plan may be, it may have to await a time when access to space is as unfettered by government interference and as available to the general public as high-power computation is today. This would place the necessary emphasis on economic exploitation, rather than pure exploration, which accords more completely with a laissez faire conception of man's mastery of outer space.

*Michael J. Dunn*
*Auburn, WA*

Robert Zubrin is cited in John Tierney's "Martian Chronicle" as proposing that only hydrogen be transported from earth to Mars, there to be combined with the abundant $CO_2$ to form methane ($CH_4$) and oxygen. These two gases would then be used to propel the spaceship back to earth. Zubrin had a piece in *The New York Times* some time back along these lines as well.

Now, this Ph.D. chemist (admittedly specializing in history of chemistry, not engineering) has a problem with this. $CO_2$ is a very thermodynamically stable compound. Reacting it with $H_2$ requires an input of some 82 kilocalories of free energy per mole of methane formed (over 5,000 cal/g). I have tried to figure out whence this energy might come and asked friends too. We have come up empty (one suggested, tongue in cheek, cold fusion). Tierney states, "Zubrin built a machine to demonstrate how easily it could be done," but this undoubtedly uses an energy input from the local Edison company. Where would that energy come from on Mars? Solar energy is comparatively feeble there (perhaps a quarter of what it is here; I don't have the numbers), and surely Zubrin does not suggest carrying a nuclear reactor, which would defeat the whole goal of a light payload.

So please enlighten me, for I am at a loss. I am willing to violate many a law, but the laws of thermodynamics are more Draconian than anything Congress might pass.

*Albert S. Kirsch*
*Brookline, MA*
*askirsch@compuserve.com*

**Robert Zubrin replies:** Mr. Kirsch is mistaken. $CO_2$ has a heat of formation of 92 kilocalories per mole; methane, 18 kilocalories per mole; hydrogen, 0 kilocalories per mole; and water, 57 kilocalories per mole. The methanation reaction is: $CO_2 + H_2 \Rightarrow CH_4 + 2H_2O$.

The binding energy on the right hand side of the equation is 92 (for the $CO_2$), but the left is 18 + 57 + 57 = 132. So the net binding energy is increased during the reaction by 132 – 92 = 40 kilocalorie per mole. The reaction is thus highly exothermic.

Of course, the water electrolysis reaction that will produce oxygen from the $H_2O$ is endothermic. Which is why we do ship a nuclear power plant to Mars.

## Doctors Take on HMOs

I cannot imagine what Thomas Hazlett's point was in writing "HMO Phobia" (February), nor in REASON's publication of it in a journal for "free minds and free markets." I do not write to support Dr. Smith nor to comment on his opinions. Instead I wish to rebuke Mr. Hazlett and shed light on the health care "crises."

An HMO is an insurance company and cannot practice medicine. Therefore, in answer to Mr. Hazlett's rhetorical question, physicians—not HMO shareholders—have brought health care to the masses for the last 2,500 years. And whose business is it what a doctor does in his free time? And since when do contributing editors to REASON use income to support or castigate any group (in this case, doctors)?

Most doctors don't own MRI units, pharmacies, physical therapists, or hospitals and therefore cannot control costs. When a patient is sent to a specialist with a surgical diagnosis, the only treatment is usually surgery. Yet if the doctor is busy and does a lot of surgery, the HMO will label him an "overutilizer" and explain to the other doctors in the HMO that their reimbursement will be lower this year because too many surgeries were done and costs were too high. The only way to solve the problem in the HMO model is to deny treatment.

The fundamental problems in health care today are twofold: First, patients want unlimited health care and don't want to pay for it. Second, too many health care dollars go to bureaucracy in the form of HMOs and insurance companies.

The solution is simple and was the model for medicine in this country until 1945, when it was corrupted by employer-funded insurance and later by Medicare. The solution is fee-for-service medicine (sounds like free markets, doesn't it?). Under this model, the only role for insurance companies is to cover catastrophic illness or injury, with routine office visits, prescriptions, etc. paid for by the patient. At today's prices that would be unaffordable, but with downward market pressures we would see significant deflation in the medical arena. Some things would suffer, like drug research and development, and we have to be prepared to accept that.

It is a fundamental non sequitur to "pressure providers to constrain spending." In what other area in life do we tell providers not to provide? The only one that comes to mind is the Agriculture Department's policy of paying farmers not to grow. Is this the free market model Mr. Hazlett endorses? I don't want lawyers, Congress, or Mr. Hazlett involved in medicine, and I'll bet he won't raise the issue the next time he's in the emergency room with a broken arm facing an "overutilizing" provider.

*Terry Wintory, D.O.*
*Aurora, CO*
*cowintory@aol.com*

As much as I usually admire Thomas Hazlett's writings, he has managed to trivialize a very complicated and important issue by going after a classic "bad guy."

I don't see what Hazlett's problem is with Dr. Smith's desire to make as much money as patients are willing to pay him. As far as I can tell, almost every serious investigator who has researched the origins of the high cost of medical care in the United States has concluded that after World War II employers, restricted by wartime wage and price controls, bid up the cost of third-party medical insurance benefits to prospective employees in an effort to recruit returning workers in a highly competitive environment.

This bidding war wrecked the market in low-cost health insurance, making employers the single largest purchasers of insurance (the feds only recently having surpassed them as a source of health care benefits) and divorcing the patient from tradeoffs between benefits and costs.

Naturally the feds couldn't leave well enough alone and mandated that all larger employers who offered any health care benefits had to offer an HMO as an alternative to their employees, further warping the market. Now the feds can't resist bashing the same concept they were touting just a decade ago.

For most ordinary middle-class people, the best option is to pay ordinary medical fees for ordinary visits as we go, insuring only against unexpected, high-cost illnesses and injuries. A wide range of tradeoffs between annual premiums and point-of-service co-payments is available, and employers can limit their costs by designing cafeteria-style benefits packages, allowing employees to choose the insurance plan and contribute more or less out of their own pockets to get their favorite choices.

There are many ethical and professional physicians who legitimately believe that the intrusion of powerful third parties into the practitioner-patient relationship has harmed the practice of medicine and been detrimental to the patients themselves. There are many excellent HMOs, and no one seriously believes they should be banned. The power struggle among government agencies, physicians' groups, patients' rights advocates, and employers is not relieving the situation.

*Marshall Anderson, M.D., M.P.H.*
*Deer Park, TX*
*mwander@ppco.com*

I enjoy REASON but don't find Mr. Hazlett's thoughts in "HMO Phobia" very reasoned. Income baiting is expected in other publications, but Dr. Smith's presumed golf habits seem out of place here. Instead of golf, I spend my afternoon off filling out forms for the latest Medicare perks—"free" batteries for blood sugar monitors, among other things. How much would that battery cost if time and paper shuffling were considered, and could my patient with the Mercedes afford a 59-cent battery?

Believe it or not, a patient and physician are concerned primarily with the patient's outcome, rather than his money. Where is the logic in promoting an organization that "saves" perhaps 30 percent by denying recommended medical intervention while taking that 30 percent to reward its efforts? "Health care," as they like to call it, is overpriced because the monetary worth of the individual is inflated by our legal system beyond all reason. Mr. Hazlett starts in the middle of the story, where physicians without autonomy are held liable for perfect results while forbidden, by Medicare and some insurers, from obtaining even basic screening studies.

We are second-guessed at a distance, perhaps by an idiot with a cheat sheet, on clinical decisions that require a hands-on assessment. Being damned either way is having predictable results. Realizing that 23-plus years of training and your practice can be destroyed by one "malpractice" suit has encouraged some to maximize income and minimize years at risk—do procedures, make some money, and get out. It isn't fun anymore.

A lot of money changes hands in health care. Receiving only a small portion of it, physicians assume most of the risks. We realize that costs would be hugely reduced without fear of litigation driving excessive studies and treatment. Go to the E.R. with a headache, and see how long it takes to get your CT brain scan.

The earnest concern voiced now about "patient rights" to sue HMOs seems intended to serve those attorneys not already flush from tobacco litigation and ambulance chasing.

*Stephen DeGray, M.D.*
*Bluefield, VA*

**Thomas Hazlett replies:** Dr. Wintory asks: "In what other area of life do we tell providers not to provide?" The answer is simple: in every area of economic life. In fact, just the other night I told the waiter not to bring me the 1991 Crystal Champagne. Hey, I was paying. The trick doctors, just like farmers harvesting USDA subsidies, have discovered is that getting Uncle Sam to pay (Medicare, Medicaid) or limiting customers' options by mandating

HMO coverage is a whole lot easier than squeezing the actual consumer for cash. But please, enough of the "next time you're sick" threat. I am not happy to report that loved ones have indeed gotten sick with a lot worse than a broken arm, have had their health insurance deny coverage, and have heard not a peep (nor received a cent) from doctors only too eager to cash their unreimbursed checks.

Dr. Anderson wonders why I have a problem with Dr. Smith's wanting a chance to make as much money as patients are willing to pay him, but it's no problem at all. It's just that Dr. Smith won't settle for what people are willing to pay him! He wants government to force medical costs onto third parties so the expensive service looks cheap to the patient. It's an accounting gimmick, one which encourages patients to spend without restraint and leaves a mounting burden of expenses for taxpayers and ratepayers—many of whom respond by dropping coverage until the emergency room beckons.

I was blessed to have a terrific surgeon, Dr. Robert Appleman, pluck out my gummed-up gall bladder in 1995. It is tragic that this gifted physician folded up his practice after 30 years due to the paperwork headaches now haunting medicine. (Mine was his very last operation.) But the open-ended demand which consumers thought they enjoyed busted the bank, and now they are searching for more affordable health care. The HMO pencil pushers so decried by the M.D.s are, in fact, consumer cost-containment agents. If doctors (and their newfound friends, the lawyers) pledged fealty to "consumer sovereignty" they could assist in devising systems which limited costs while bestowing bonuses on dedicated practitioners like Appleman.

Regarding Dr. Anderson's statement that there are many excellent HMOs and no one seriously believes they should be banned: Of course they do! Not only is for-profit medicine denounced, single-payer plans in Congress and the highly touted HMO "bill of rights" regulation aim to cripple the competitive position of low-cost health plans.

Dr. DeGray's comments do not seem to cross my article except insofar as I have ignored the degree to which his profession is forced to account for its paper clips. He claims to be offended by comments he calls "income baiting," but then goes on to bash Mercedes-Benz owners for low deductibles. I think he mocks.

The litigiousness of the American medical system is surely our common foe. But I do not understand the rage of doctors who, having the ability to band together to compete with HMOs and insurance companies, opt instead to (literally) sell out to them while yakking about what others will pay for.

If you think the HMOs are screwing up patients' health and doctors' wealth, then build a better insurance vehicle. If the HMO system is oppressing conscientious physicians with idiotic rules crafted by inept empty suits, then providing better and more popular doctor-run health networks ought to be the hottest thing on Wall Street since "dot-com" was virtually born.

Competing in the arrogance department would not likely be a problem for the doctors. To wit, Dr. DeGray: "Physicians assume most of the risks." Really? Is that what you whisper in patients' ears when rolling them into the O.R.? Well then, thanks for the warning, Doc.

## Muddied Waters

Richard Epstein concludes his review of *The Shape of the River*, a long defense of racial preferences in college admissions by William Bowen and Derek Bok, by advocating "decentralized decision making" ("Unexplored Tributaries," February). That way, each school could decide on its own whether to discriminate on the basis of race and ethnicity in selecting its students.

Professor Epstein cheerfully acknowledges that this approach runs afoul of current law, and he calls for that law's repeal. But while we are waiting for Congress to revoke the Civil Rights Act of 1964—and I hope Professor Epstein isn't holding his breath, as I would hate to lose him—the issue we face in the real world is this: Should colleges and universities be barred from discriminating against whites and Asians, just as they are now barred from discriminating against blacks and Hispanics?

One can defend the decentralized scheme that Professor Epstein advocates. One can also defend the law that was actually written and passed in 1964, prohibiting colleges that receive federal money from discriminating against anyone because of race or ethnicity. What is indefensible, however, is the law as it is currently interpreted by the federal bureaucracy and defended by Messrs. Bowen and Bok: a ban on discrimination against some people (blacks and Hispanics) but not others (whites and Asians).

*Roger Clegg*
*General Counsel*
*Center for Equal Opportunity*
*Washington, DC*

How did clearheaded Richard Epstein end up so muddled in reviewing *The Shape of the River*?

"Just the facts"? That is hardly what Bowen and Bok offer readers. Indeed, as our article in the February issue of *Commentary* makes clear, they often misleadingly spin the reliable data they do offer, while averting their gaze from the facts that do not support the racial preferences they—as former presidents of Princeton and Harvard—worked so long and hard to institute and implement.

While they assert that many factors other than race entered into the admissions process at the five private schools they studied intensively, in fact their own numbers prove that racial considerations were of overwhelming importance. Black applicants to elite schools in 1989 had very strong credentials, they say, by the measure of student SAT scores in 1951—as if that standard had even a smidgen of relevance. Three-quarters of those students had scores better than the national average for all white test-takers—again, an irrelevant comparison. The whites and Asians admitted to the five schools had scores that put them in the 96th percentile or higher. Contrary to Bowen and Bok's claims, those who have been admitted do not do well; their grades put the black students, on average, in the bottom quarter of their class, and their dropout rates are high by the standards of the schools they attend. Bowen and Bok pretend that racial preferences are integral to the making of a black middle class, but most of the preferentially admitted students come from families that are already relatively well-off.

This is a very abbreviated list of flaws in the "factual" arguments contained in *The Shape of the River.* Epstein casts a too-uncritical eye on the work in great part, we suspect, because he does not dispute its fundamental premise—that racial preferences are needed. (Of course, neither the authors nor Epstein call them "preferences," although that is clearly what they are.) Precisely why we can't abolish them is not clear. Epstein says that, given the "heavily subsidized nature of public education," the demand for preferential treatment of non-Asian minority students is "hard to resist." Because? If public funding demands a student body that "looks like America," then surely there are too many Asians and Jews at Berkeley and other highly selective public institutions, and too few white Christians. The working class is also underrepresented. If Professor Epstein believes in proportional representation, then surely these schools have an obligation to take the task much more seriously than they do.

Texas, which cannot engage in racially preferential admissions, now guarantees admission to the top 10 percent of every high school class. If courts are to strike down racial preferences, Epstein says, they must be prepared to invalidate the policies that states will substitute. But the 10 percent plan, since it does not engage in racial classifications, is not as bad as quotas, and critics like us would be delighted to see suits brought against practices that simply camouflage race-driven policies. Why can't courts take one step at a time?

If private colleges can decide who gets in on the basis of their skin color, Epstein asks, why can't public schools do so as well? He forgets that private colleges are likewise constrained, if Title VI of the 1964 Civil Rights Act has any meaning. We realize Professor Epstein would have Congress repeal the entire statute, but that is just one more place where he and we part company.

*Abigail Thernstrom*
*Stephan Thernstrom*
*Lexington, MA*
*Authors,* America in Black and White

**Richard Epstein replies:** I am sorry to have tread on the formidable toes of Roger Clegg and the Thernstroms in my review of Bowen and Bok's *The Shape of the River.* But their criticisms require some answer.

Roger Clegg's letter does not take me to task in principle for arguing that the 1964 Civil Rights Act is a mistake, but he insists that we have to make appropriate adjustments in the second-best world by disallowing discrimination against whites and Asians as we now disallow it against black and Hispanics. The uncomfortable social truth, however, is that the strict color-blind rule will empty out the major colleges, professional schools, and graduate programs of virtually all their minority students.

The relevant tradeoff (for those who are not agnostic about academic merit) is how much of an academic discount should be made for minority students in order to avoid that result. I don't have the answer for all institutions. But I suspect that the one unacceptable answer for most institu-


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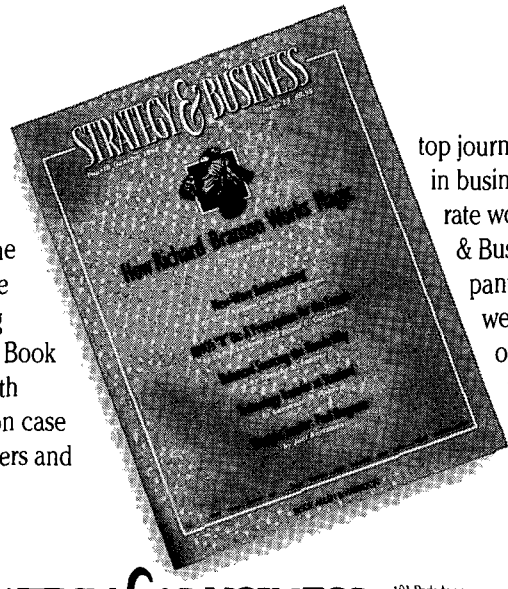


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tions is no compromise at all. It is silly to contend that the persistent use of affirmative action—or racial preferences; the phrasing is not decisive—comes without any cost, when clearly the costs are high. But it is equally naive to contend that the refusal of private institutions to bend from the color-blind principle has no costs either, when clearly it does in terms of their social legitimacy. The world is full of painful tradeoffs, but these are better made at the institutional, not the social level.

The first part of the Thernstroms' letter is directed less toward me than toward discrediting Bowen and Bok's claims about of the successes of affirmative action. On this question, the Thernstroms have a lot of ammunition and, for all I know, may well be correct. But that factual dispute is a sideshow to the main event. If Harvard and Princeton want to run affirmative action programs that succeed by their own lights but fail by ours, let them, even if the Thernstroms and I might do things otherwise. My call is for institutional autonomy, not proportionate representation, as the Thernstroms suggest. When Bowen and Bok oversell their program, they should have to answer not to outsiders but to their respective institutions, whose ardor for racial preferences might cool with a full and accurate accounting of its costs. But if these institutions remain undeterred, there the matter should end.

Public institutions present a much harder nut to crack because of the obvious concern about equal treatment of all citizens. By the same token, it is troublesome to use general revenues drawn in part from the poorer groups in society to subsidize the children of the intellectual elites. Perhaps the constitutional command for equal protection requires not only equal treatment between applicants, but equal benefits to all individuals taxed, which in turn means that they have in practice an equal chance of admission. I am very unhappy with both extremes and would resist writing either into law. By the same token, I fear that public institutions, buffeted as they are by political pressures, are not equal to the task of making the necessary marginal adjustments through the affirmative action thicket. Instead they tend to lurch first too far in one direction, then in the other. No easy choices here.

Finally, the Civil Rights Act of 1964 does not put the matter to rest. The act, as drafted, clearly implements the color-blind position, just as the Thernstroms state. But the Supreme Court has construed the act to allow for voluntary affirmative action programs intended to remediate past discrimination. My clear sense is that this once-large exception will gradually close. But the battle over racial preferences will not end, for its real impulse today comes from the call for diversity in the face of unequal qualifications.

If forced to choose, I would rather keep the current unhappy status quo than put all institutions in a straitjacket by allowing no minority preferences at all. But that is a strict second-best judgment, based on the hope that it is possible to temper some of the present excesses. The first-best position is to reduce government involvement in education, however unrealistic it seems at the moment.

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## Blocked Track

In "Fast-Track Impasse" (February), Brink Lindsey says, "In reality, globalphobia rests on economic illiteracy." Perhaps the free-traders should examine their own logic before accusing others. With free trade and an income tax, there is no tax on imports at the border and no tax at the point of sale. Imports get a free ride. Because the income tax increases the price of domestic products, we are currently pricing our domestic products out of the marketplace.

Before the 16th Amendment of 1913 gave us the income tax, imports did not get a free ride. Then imports and domestic products both were taxed. It is folly and economic illiteracy to discuss free trade without taking into account the changes in our tax system that occurred after 1913.

*Bert Loftman*
*Atlanta, GA*
*b.loftman@gte.net*

**Brink Lindsey replies:** The argument that duty-free imports enjoy a tax advantage because they don't bear the full burden of U.S. income taxes assumes that foreign producers are exempt from corporate income tax in their home jurisdictions. That assumption is, by and large, unfounded. More broadly, all forms of taxation distort economic activity in one way or another; the trick is to avoid those taxes that do the most damage. While I'm no fan of income taxes, import duties—which reduce incentives to innovate in the face of foreign competition, block access to needed inputs and supplies, inhibit exports, and restrict consumer choice—are even worse. They have no role whatsoever in any sensible tax policy.

## Tax Theories

David Levenstam ("Constitutional Challenge," January) is quite correct that merely repealing the 16th Amendment, which created the income tax, would not prohibit future Congresses from reintroducing an income tax. This is particularly true give the inclination of the Supreme Court during the last 50 years to assign powers to Congress that are nowhere found in the Constitution. What I and most national sales tax advocates support is a constitutional amendment that has been proposed by Rep. Sam Johnson (R-Texas). Johnson's simple amendment states: "The sixteenth article of amendment to the Constitution of the United States is repealed, and the Congress shall have no power to lay and collect taxes on incomes, except in time of war declared by the Congress." I think Mr. Levenstam would agree that this should do the trick.

*Stephen Moore*
*Director of Fiscal Policy Studies*
*Cato Institute*
*Washington, DC*

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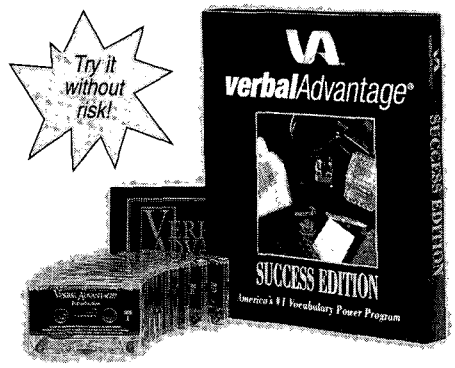


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## Lucky Shot

By Jacob Sullum

The jurors in *Hamilton v. Accu-Tek*, a lawsuit blaming gun makers for seven shootings in the New York City area, deliberated for six days at the federal courthouse in Brooklyn. They repeatedly sent out notes saying they were deadlocked, but U.S. District Judge Jack B. Weinstein told them to keep arguing.

When the jurors finally announced a verdict on February 11, the puzzling mix of seemingly contradictory findings suggested that they had tried to split the difference between irreconcilable positions. They said 15 of 25 manufacturers were negligent but only nine were liable, and they awarded damages—$560,000, a pittance by the standards of modern litigation—for only one shooting.

Despite the inconsistencies, the verdict endorsed the idea that gun makers can be held liable for "negligent distribution"—in this case, for "oversupplying" firearms to states with few gun restrictions, knowing that some of the weapons will end up on the streets of New York. A similar premise underlies lawsuits filed by Chicago and other cities. (See "Firing Squad," page 58.)

The "negligent distribution" theory asserts that manufacturers are collectively responsible for criminal violence. In an audacious departure from traditional tort law, the plaintiff need not even show that his injury was caused by the defendant's product. None of the companies sued in *Hamilton* was charged with making any of the guns used in the shootings.

Even if it is ultimately overturned, the *Hamilton* verdict is expected to encourage more lawsuits by individuals and cities. Chicago and New Orleans sued gun makers last fall, and in recent months Miami, Atlanta, and Bridgeport, Connecticut, have followed their lead. Other cities, including Cincinnati, Philadelphia, Baltimore, and Los Angeles, may join the list.

The industry's supporters are trying to curb this trend by lobbying state legislatures to bar cities from suing firearm manufacturers. The Georgia legislature passed such a bill in February, and the National Rifle Association is planning to work on Louisiana next. Meanwhile, Rep. Bob Barr (R-Ga.) has introduced a federal bill aimed at blocking the suits.

## Balance Sheet

By Jeff A. Taylor

ASSETS

△ **Ritually Obtuse.** The state of Illinois considers whether to revoke the medical license of Bennett Braun, whose claims about satanic ritual abuse helped spawn countless TV reports and a cover story in *Ms.* The state's action stems from Braun's $10.6 million settlement with a former patient who charged that he made her believe she had 300 personalities, ate human flesh meatloaf, and was a high priestess of a satanic cult.

△ **Stamped Out.** Plentiful jobs help shrink food stamp rolls across the country. The Department of Agriculture reacts as any bureaucracy would, wondering why its "services" go untapped. Its defenders in Congress promise hearings.

△ **Switch Off, Eh.** The Canadian Broadcasting Corporation was supposed to be all things to all Canucks, and it got plenty of tax money to pursue its mission. But recent government budgets have cut back on CBC funding as Canadians tune into more and more private-sector fare. The network now gets less than 10 percent of English-speaking viewers, 20 percent among Francophones. The CBC could be trimmed down even more if some government officials have their way.

△ **Womyn Only.** Boston College refuses to allow a feminist professor to ban male students from her classes. Mary Daly, author of such influential tomes as *Gyn/Ecology: The Metaethics of Radical Feminism* and *Outercourse: The Be-Dazzling Voyage*, opts to go on leave rather than teach men.

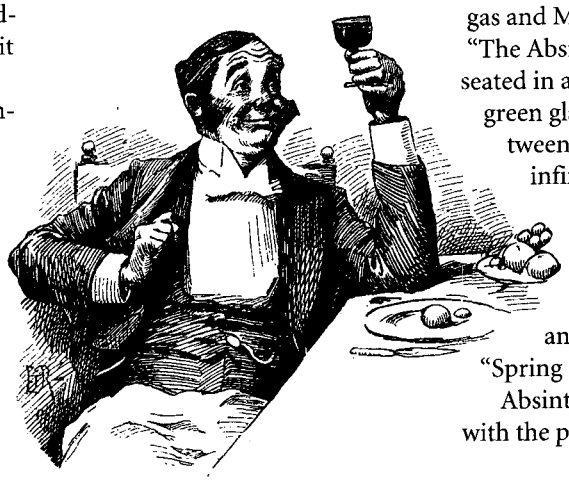
## Absinthe Friends

By Charles Paul Freund

Decadence will out. While you are crusading against one form of it, it seems, another variety will spring up behind your righteous back. Thus, while we are witnessing a frenzy against the demons of drugs and tobacco on one front, on another, people are starting to sip absinthe again.

Yes, absinthe. The purportedly madness-inducing "green fairy" of 19th-century bohemia is coming back. *The Washington Post* reports that barmen around London are again learning the old ritual of preparing a glass of absinthe and customers are licking their lips in anticipation of *fin de siècle* danger.

Many drugs and stimulants have storied traditions, but few can claim the cultural associations of absinthe. A hundred years ago, it was the very nectar of art; the taste of sweet decay; the color of avant-garde transcendence. Oscar Wilde claimed, "A glass of absinthe is the most poetical thing in the world." Hemingway characters drank it in Spain to forget war and women. Painting after painting—most famously by Degas and Manet—depicted "The Absinthe Drinker" seated in a café by a pale green glass, hovering between stupefaction and infinity. A figure in a Rilke poem looks dolefully into a murky cup of the stuff and murmurs, "Spring is here."



Absinthe is bound up with the politics of its era

▼ **Disturbed Seating.** Sudden fretting over the way kids are buckled in brings forth wacky directives. A new federal standard would raise the cost of new child car seats by about $60 and render old ones incompatible with new cars. Meanwhile, Connecticut tells cabbies they must provide kiddie seats. Hacks say they have a better idea: They'll just refuse to take passengers under 40 pounds. Good plan.

▼ **Radio Waves.** Another band of outcasts feels the heel of the federal boot deep in the heart of Texas. U.S. marshals and FCC cops raid low-power radio operators in Canyon Lake and cart away electronic gear and music. FCC Chairman William Kennard says he favors low-power radio, but high-dollar license holders hate it, claiming the low-wattage stations mess up the frequencies the FCC has licensed to them.

▼ **The Tax Card.** When the Granite State cracks, you know you are in trouble. Faced with a court order instructing it to find a more equitable way to fund school districts across the state, New Hampshire is set to impose an income tax. Many other states are in similar straits.

▼ **Why-Fly Zone.** American fighters and Iraqi gunners play cat-and-mouse games in the U.N.-mandated no-fly zones as anti-Saddam policy falls apart. U.N. weapons inspection teams will never be allowed in Iraq again, and Saddam is reaching out to old enemies, saying, "See, I told you the Americans use the U.N. to spy on me."

LIABILITIES

as well, as Barnaby Conrad notes in his rich 1988 chronicle, *Absinthe: History in a Bottle*. Among the charges made against it was that it was a tool of Jewish conspiracy. But anti-Semites liked drinking it, too, and they were soon obliged with a brand of absinthe that was labeled, "anti-Juive."

What happened to it? Absinthe contains wormwood, which had a psychedelic reputation. Some sensational murders of the time were blamed on absinthe delirium; some scientists decided that the drink could bring on epileptic fits and lead to addiction. Such research is now regarded as worthless, but progressive crusaders in the United States and elsewhere succeeded in getting the liqueur banned.

Britain never did so, the *Post* reports, because the stuff was never popular there. Green Bohemia, the distributor of the new absinthe, is claiming its variety is quite safe, though it would seem the lure of the drink lies in the reputed risk. In fact, there are no useful data on the long-term effects of imbibing wormwood.

Historian Conrad once tracked down a home-brewed bottle of the stuff on the continent and drank it quietly in his Paris hotel. He dozed off, remembering nothing the next morning until he was drinking coffee. "Then it came to me," he writes, "that at some point in the previous evening, I thought I knew the answer to life; only now I had forgotten it."

## OK Corral

By Jacob Sullum

Despite widespread sentiment that he does not belong there, Will Foster remains imprisoned at the Lawton Correctional Facility in Oklahoma. Foster, a 40-year-old computer consultant and father of three, was arrested in 1995 for growing marijuana in his basement. (See "Pot of Trouble," May 1997.) Although he said the marijuana was for treating his rheumatoid arthritis, a jury convicted him in 1997 of various drug charges and sentenced him to 93 years.

Last August, saying Foster's sentence "shocks our conscience," an appeals court reduced the time to 20 years, making him eligible for parole. Days later, a parole board voted unanimously to release him. Three prison supervisors who said they rarely intervene on behalf of inmates urged Oklahoma Gov. Frank Keating to sign the parole order. After Foster's supporters received discouraging replies, the prisoner wrote to the governor, saying "it is my understanding that you have no intention of approving my parole." He was right. In late January, Keating rejected the parole board's recommendation. Richard Kirby, the governor's spokesman, says the decision was due to "a combination of factors," including strong objections from the district attorney and the fact that Foster had served less than 10 percent of his sentence.

## Aspartamania

By Mariel Garza

Aspartame—the artificial sweetener used in ▶

QUOTES

**"When parents are on the car phone talking to their kids explaining why they can't get home for dinner or can't do bedtime stories, that really has an impact on the quality of life."**
—Vice President Al Gore, proposing a national traffic information phone line, March 9, 1999.

**"The president tasted, but did not swallow."**
—Anonymous reporter, having witnessed hemp beer being served on Air Force One in February.

**"Clinton made trashing women the national pastime; every woman with a story to tell became a woman with a foul motive or a questionable mental state."**
—Gwendolyn Mink, professor of politics at University of California at Santa Cruz, in Institute for Public Accuracy press release, February 11, 1999.

**"We have said to sexual predators, 'The law will follow you wherever you go,' and we are working to establish a national registry for sexual predators to make absolutely sure that that is exactly what happens."**
—Bill Clinton, signing anti-sex-crime legislation, October 3, 1996.

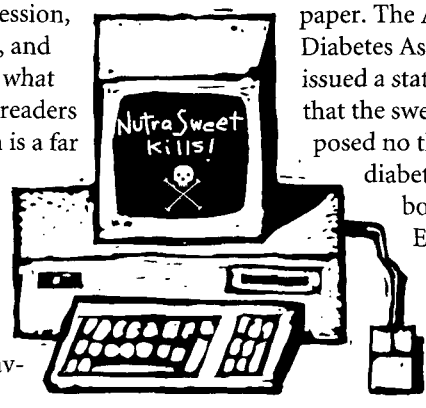
## BRICKBATS

**◆ Cheng Meiyeng has traveled China setting up Protestant churches that refuse to affiliate with the official China Christian Council. For that, she was detained by police. After she was released, she was found to have severe head injuries, leaving her with complete memory loss and disoriented to the point that she "exhibits the appearance of insanity," supporters say. The police say they have no responsibility for her condition, but her supporters say she was beaten with a water-soaked rope whip and a police baton.**

**◆ Kelly Dillery likes to take her 4-year-old daughter with her to the grocery store and to the library, and she often takes her to a local playground. But if the Sandusky, Ohio, police have their way, Dillery may not take her daughter anywhere any more. Kelly Dillery has muscular dystrophy and she uses a wheelchair. When she goes somewhere, she straps her daughter in for a ride. She generally travels on the sidewalk, but sometimes there is no sidewalk and she must travel on the street. That's where the police come in. For using her wheelchair in the street while the girl was on board, they've charged her with child endangering, a crime that carries a $1,000 fine and up to six months in jail. Dillery has refused to plea bargain down to disorderly conduct or to stop taking her daughter with her.**

products such as NutraSweet and Equal—is wreaking havoc on the health of America. If you didn't realize it, don't feel too bad. I didn't either, until some concerned friends and relatives forwarded me a pseudo-scientific, faintly official-sounding e-mail message warning that the stuff is causing health problems ranging from dizziness to death.

Among other maladies, the widely posted missive blames the sweetener for killing diabetics in droves and causing epidemics of multiple sclerosis and lupus. The message also implicates the sweetener in Gulf War Syndrome, Alzheimer's disease, vertigo, depression, memory loss, and tinnitus. But what really makes readers pay attention is a far more terrifying claim: Aspartame makes people fat by causing an insatiable craving for carbohydrates.




Before you toss that case of Diet Coke, though, there's one more thing you should know: The aspartame letter is a cybermyth, the electronic age's answer to an urban legend. As with the Internet-spread tales of rogue doctors gutting business travelers for their organs and the "official" memo implicating the U.S. military in a 1996 TWA airplane crash, its claims have been thoroughly debunked. And yet, the message was so widely read and its claims so potentially scandalous that NutraSweet's manufacturer, Monsanto, and various health groups responded both in cyberspace and on paper. The American Diabetes Association issued a statement that the sweetener posed no threats to diabetics, and both the Environmental Protection Agency and the Food and Drug Administration—the agency that approved aspartame in the first place—disputed the veracity of the message.

Iain Murray, a senior analyst at the Statistical Assessment Service, a nonprofit group dedicated to improving the public's understanding of scientific information, explains that the aspartame hoax had been circulating in cyberspace for more than a year but only reached critical mass in December. Ironically, he notes, the one side effect that researchers have proven to be associated with aspartame—headaches for people with a certain syndrome—was not mentioned in the diatribe.

While this latest e-mail imbroglio may provide precious little information about the actual effects of aspartame, it does suggest how the Internet simultaneously facilitates cybermyths and disseminates information to counter them. For a full accounting of the aspartame hoax (and dozens of similar

ARTIFACT

## Civil Wardrobe

Yes, that is a descendant of slaves, and yes, that's a Confederate flag on his shirt. The shirtmaker, a black-owned South Carolina company called NuSouth, has recast the cross in red, black, and green, the colors of African liberation. Stirring further trouble, the company's founders have marched on their state legislature, demanding that it lower the Confederate emblem that currently flies above the capitol—and replace it with their logo.

This was something new: The Confederate flag has many defenders and detractors, but few would merely like it to ...evolve. But why not? In different contexts, the Southern Cross might represent racism, regional pride, or an enthusiasm for Lynyrd Skynyrd; there's no sense in branding everyone who waves it a closet Ku Kluxer. Meanwhile, the flag's partisans have made an almost identical mistake, claiming their Confederate relics bond them to a timeless tradition rather than a highly contingent, constantly changing bundle of meanings.

Best, then, to shake off those interpretive shackles and let these symbols evolve more freely. The NuSouth logo may be factitious, gimmicky, even crass, but it hints at more truths about Dixie than any bromides about the Old South or platitudes about the New. Fly it proudly.

**—Jesse Walker**

cybermyths), turn to the Urban Legends Reference Pages (www.snopes.com), a Web site maintained by the San Fernando Valley Folklore Society. The site not only provides a handy, searchable database of such hoaxes, it provides an in-depth history of each one.

### Running Around

by James V. DeLong

Media reports inform us that transit planners have "only recently recognized as important" the fact that people do not drive straight home from work: They do errands, drop off the cleaning, pick up the kids, buy groceries, and so on. This is especially true of women, two-thirds of whom make stops. Men, the pigs, do so less than half the time, dumping the chores on their wives. But men, say the planners, are more than twice as likely to detour into a bar.

Such news has profound implications for the ongoing crusade to force everyone into car pools or onto mass transit. Car pools don't work when everyone must go somewhere different. And it's already difficult to make public transit work for direct shots between home and work, except in cities such as New York that have high densities at both ends of the trip. It becomes virtually impossible when you factor in side trips. After all, hopping on and off a transit system already eats that most valuable of commodities: time. The prospect of juggling a couple of toddlers and three bags of groceries on the way only makes it less attractive still.

The recognition of errand running raises disturbing questions about the planners' claims to knowledge. How could they not have known all along such an elemental fact about our behavior? What else have they failed to notice? One can hardly wait for the next revelation. Perhaps they will learn that people value time, comfort, predictability, autonomy, and control.

Indeed, this most recent discovery underscores planners' divorce from reality and highlights the basic problem with the current "smart growth" hype: It expects people to redesign their lives around politically correct transportation systems,

rather than demanding that those systems adapt to users' needs.

### Tax Murder

By Mariel Garza

Here's a movie worth watching: An Atlanta-based company called The Script Shop that hawks TV and film scripts by mail and the Internet refuses to sell its wares in its home state of Georgia. The culprit: a state sales tax system every bit as twisted—and unbelievable—as the plot to Hollywood thrillers like *Basic Instinct* and *Mission: Impossible.*

Georgia has a base sales tax of 4 percent. But depending on which county you're in and what year it is, the actual tax rate could be as high as 7 percent. As a helpful Department of Revenue official explains, each of the state's 159 counties can add up to 3 percent. For example, ▶

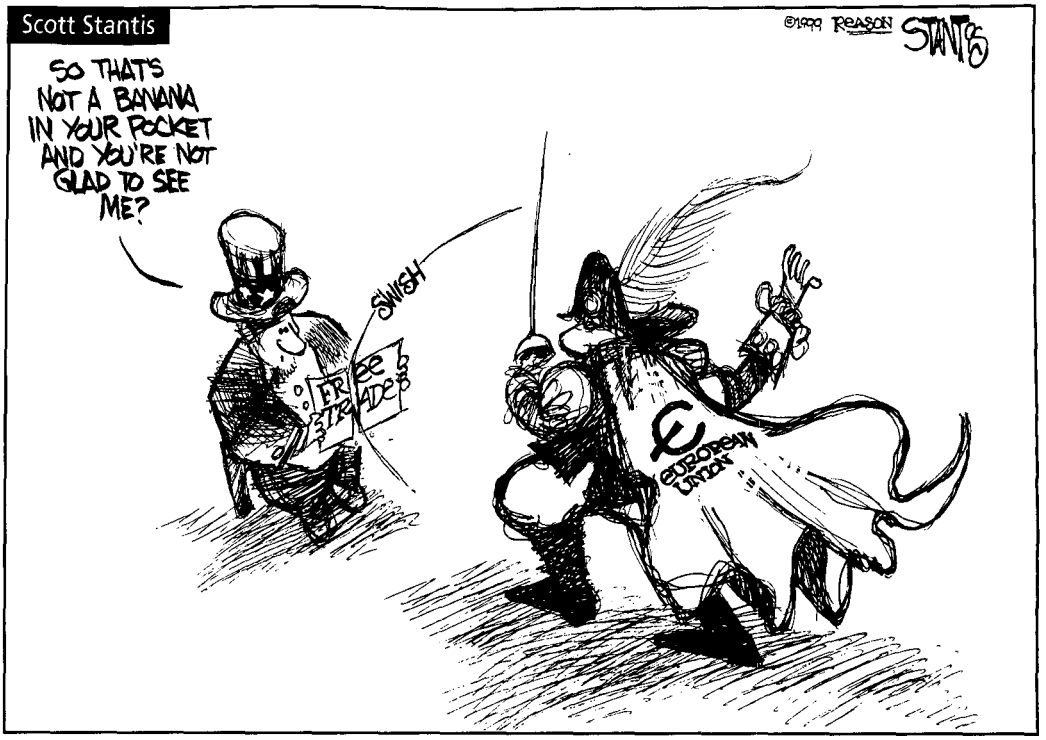
## BRICKBATS

**◆ Last year, the Alabama legislature decided to ban strip clubs. While it was at it, it barred the sale of items that stimulate the genitals. So if you want dildos, vibrators, ribbed condoms, and other such goodies, you'll have to go out of state. A group of women has taken the state to court over that law. Perhaps the legislature should show they aren't backing down by banning the sale of hot tub jets, stationary bicycles, and bathtub faucets.**

**◆ Anthony M. Rizzo Jr. was fired from a job as an administrator by a high school in Fairfax County, Virginia, after seven female teachers accused him of making vulgar comments and touching them inappropriately. He denied the charges. In fact, he still denies the charges 10 years after they were made. But that hasn't stopped his lawyers from successfully getting him disability retirement pay of $38,000 a year for a "psychosexual disorder" that leaves him unable to supervise women without sexually harassing them. In court, a psychologist for Rizzo claimed that his denials are just proof of his sickness.**

**◆ South Korean police arrested a teenager for creating a Web site that celebrates North Korea. He faces charges of "possessing or distributing data that can benefit, eulogize or encourage the enemy." Now that this dangerous criminal has been apprehended, police are looking for the 4,000 or so people who logged on to the site.**

Scott Stantis



two counties in the Atlanta metropolitan area charge an extra 1 percent to subsidize MARTA, the local mass transit system. And many counties tack on an extra 1 percent tax to build new schools, fund new streets or sidewalks, or pay for special projects. The supplemental sales tax can't be levied for longer than five years without reauthorization, so some are expiring as others are going into effect.

The inherent complexity of the system—and the massive paperwork necessary for compliance—has caused The Script Shop to shut down production when it comes to the Peach State. "The sales tax requirements are so complicated and the paper work is so time consuming that we actually lose money if we sell our products in Georgia," explains The Script Shop's Web site (www.scriptshop.com). Not a Hollywood ending, exactly, but a totally understandable one.

## Vice Profits

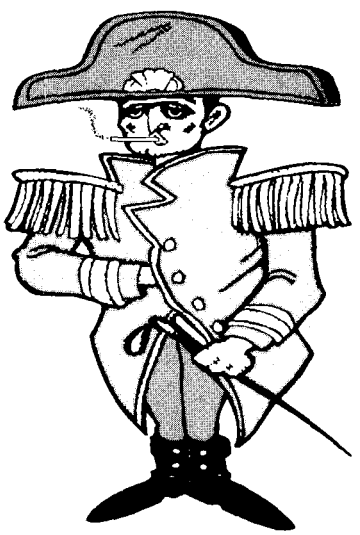
By Jacob Sullum

Urged to ban tobacco, Napoleon III is said to have remarked, "This vice brings in 100 million francs in taxes every year. I will certainly forbid it at once—as soon as you can name a virtue that brings in as much revenue."

The emperor was a bit more candid than contemporary politicians, who rail against tobacco even while profiting from it. Although the controversy over smoking is usually portrayed as a battle between selfless public servants trying to stamp out a deadly habit and evil corporations growing rich from their customers' folly, the truth is that the government makes more money from the cigarette business than the tobacco companies do.

In 1998, the industry's average profit on domestic cigarette sales was about 23 cents a pack. The federal tax was 24 cents, while the average state tax was 36 cents. Some of that tax revenue is earmarked for anti-smoking or health-related programs, but most of it simply goes into the general fund and is spent on whatever legislators deem worthy.

Government's share of the



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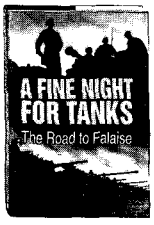


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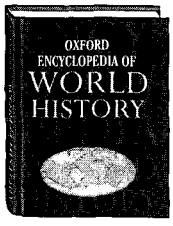


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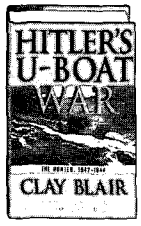


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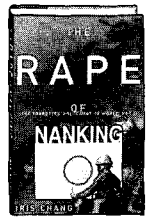


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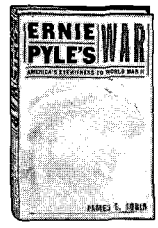


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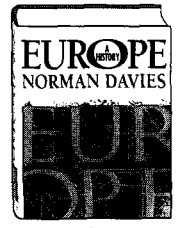


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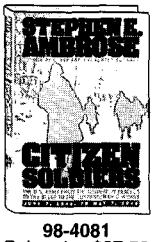


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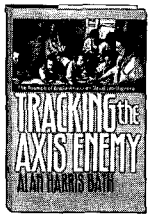


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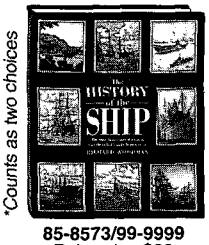


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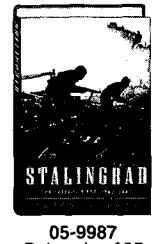


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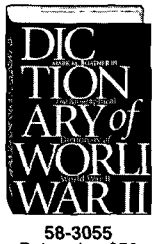


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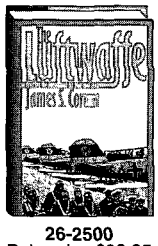


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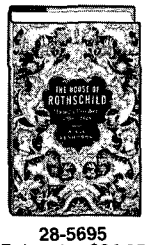


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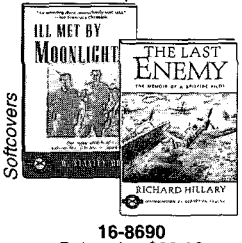


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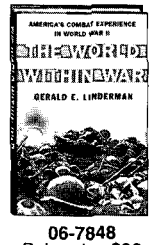


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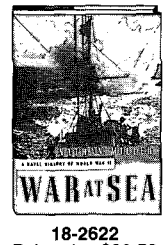


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## BRICKBATS

**◆ Under German law, prostitutes must pay taxes, but they don't qualify for any of the nation's generous social-welfare benefits. The new leftist government thinks that's unfair. So Christine Bergmann, the minister for women, wants to rectify the situation by giving hookers a legal right to unemployment, health, and retirement benefits. Bergmann also wants to ban pornography that shows "demeaning" acts against women.**

**◆ Most TV shows now carry warning labels for violence, sex, and adult language. The Christian Action Network wants to expand that list. In a letter to the FCC, it asked for an *HC* rating to signal *homosexual content*. But figuring out what qualifies as homosexual content might be more problematic than CAN seems to think. Sure, some shows have openly gay characters (although they never seem to actually have sex). But what do we do about the lesbian overtones of *Xena: Warrior Princess*? The prissy, opera-loving Crane brothers of *Frasier*? Amateur wrestling? Or, perhaps most troubling of all, *Teletubbies*?**

**◆ New York has become the first city in the nation to seize the cars of suspected drunk drivers. Mayor Rudy Giuliani says the city will likely return the cars of people who aren't convicted but that there are no promises.**

**—Charles Oliver**

Henry Payne

"SO THE GOOD NEWS IS WE'VE GOT A SOLUTION TO THE Y2K BUG. THE BAD NEWS IS IT COMES BUNDLED WITH WINDOWS 98."

tobacco business is growing. The federal cigarette tax will hit 39 cents in 2002, and state taxes are also going up (California's rose by 50 cents in January). The states will rake in even more money—some $10 billion a year—from industry payments obtained through Medicaid lawsuits. Meanwhile, President Clinton says he plans a lawsuit demanding "hundreds of billions" from the industry, and he wants to raise the federal cigarette tax by another 55 cents.

In short, government is fast reducing Philip Morris et al. to the status of bit players in the tobacco trade. The terms of this partnership are clear: The government gets most of the money, and the cigarette companies get all of the blame.

## Ribbitting Story

By Brian Doherty

"Attention Earthlings! You are hereby put on global alert. Frogs and toads are disappearing on your planet. Others are born deformed with missing or extra arms and legs. You must join Frog Force now, get involved in finding the cause, and become a friend to frogs everywhere...Over and out." So speaketh the Hon. Capt. Ribbitt, "Earth's Ambassador from the Planet Amphibian."

Lest there be any sort of *War of the Worlds* misunderstanding: Ribbitt is in fact a U.S. government employee, the cartoon mascot of a new effort by the Department of the Interior to raise awareness about what it claims are increases in mutant frogs and declines in overall numbers. Improbably, the Task Force on Amphibian Declines and Deformities includes representatives from the departments of state, justice, and defense along with people from environmental and scientific agencies. (For more information on TADD, including public service ads and Ribbitt's full comments, see www.frogweb.gov.)

The mutant frog crisis first hit the media in 1995, after a school field trip in Minnesota found an unusual number of deformed frogs in one pond. Since then, the Minnesota Pollution Control Agency has spent millions investigating

## 30 YEARS AGO IN REASON

☛"The college president who sadly shakes his head and mumbles that he cannot understand what motivates [student] protestors is like that kind of parent who, after doing everything possible in the span of two decades to destroy his child's mind, laments to the world that the child refuses to think for himself. Well, what was expected?"

**—from "No One To Stop Them"**

the issue. In September 1997, it announced that local well water was definitely causing frog deformities and began giving out bottled water to frightened residents—only to later admit it had been mistaken. In the wake of continuing state and federal research, it remains unclear whether deformities are actually increasing or simply getting more attention.

It is also unclear whether frog die-offs are happening in unusual numbers. Government-financed scientists have fingered pesticides and ultraviolet radiation as possible culprits but admit such findings are highly speculative (UV rays, for instance, can cause problems in amphibian eggs in labs, but no one has shown that eggs in nature are actually being exposed to unusual amounts of UV). More recently, a fungus called

chytrid has been identified as a global frog killer. This threat, too, may be man-made, but in a way that packs no regulatory punch: Scientists themselves are likely spreading it by not cleaning their boots after tromping through infected areas.

In any case, natural fluctuations in frog populations may be the simplest explanation for the apparent frogicide. As the government's Web site notes, one of the species whose shrinking numbers worry regulators now—the Northern Leopard Frog—created a false alarm in the Midwest during the '60s and '70s. Though that earlier scare "initiated...concern about amphibian declines...many of these original declines have stopped and populations have recovered to some extent."

Regardless of whether there is an actual crisis, however, Capt. Ribbitt can rest assured that he has a dedicated ally in the United States of America. As William Brown, science adviser to Interior Secretary Bruce Babbitt, told *BNA Daily Environment*, "There are a whole set of regulatory initiatives" set to be enacted once government researchers find what they're looking for.

SOUNDBITE

# No Deals

**By Michael W. Lynch**

Rep. Ron Paul (R-Texas) is a rare congressman: Trained as a physician, he served in Congress briefly in 1976, and then from 1978 to 1984. In 1988, he ran for president on the Libertarian Party ticket, garnering over 400,000 votes. In 1996, over the objections of the Republican leadership, he ran for Congress again, handily winning both the primary and general elections.

But what makes Paul especially unusual is this: He takes the Constitution's limits on federal power seriously. Before voting on a piece of legislation, he submits it to a two-part test. First, he asks if the program is actually authorized by the Constitution. If it is, he then consults his campaign promises, which include pledges to never raise taxes or increase spending. Suffice it to say that Paul votes nay on a regular basis. In February, Washington Editor Michael W. Lynch talked with Paul about the upcoming session in Congress.

**Q:** What do you think is the most important issue before this Congress?

**A:** Whether we expand the size of government or shrink it. And there's a 99.9 percent chance that it will expand. We'll go up in taxes; we'll go up in regulations; and we'll see a continued attack on our personal liberties. There's been no reversal in those trends. I think spending is going to go up tremendously. But there will be a "compromise": Conservative will get their type of spending, and liberals will get theirs.

**Q:** Do you see anyone among your colleagues working to reduce government?

**A:** I think there's a good group here, particularly those who were elected in 1994, but I don't think their voices are being heard. The combination of big government Republicans and Democrats makes it pretty easy to expand the role of government.

Here's a good example of how that works. The easiest program to attack for Republicans in 1994–95 was the National Endowment for the Arts. The Republican constituency hates it. But nothing gets done because 30 percent to 40 percent of the Republicans love it. They get together with the Democrats and nothing happens. That's not an exception to the rule. That's the way Congress operates.

**Q:** How does your two-part legislative test affect your ability to do deals?

**A:** I just don't do them. For instance, last year with the highway bill, a [transportation committee staffer] called and said, "You have $34 million for your district: tell us how you want to spend it." To me, that sounded like we were getting the $34 million we paid into the system back, so I told them what our projects were. The vote came up, and I voted against the bill because it was breaking the budget. When the conference bill came out, the money for my district was removed, except for maybe $6 million. So, I lost the [$28 million] bonus I could have gotten for voting for the bill. That's sort of a legislative line-item veto that committee chairmen have. That's the way the presidential line-item veto would have worked too—not to reduce spending, but to pressure politicians into spending more. Your projects will be deleted if you don't vote for more spending.

# Linear Thinking

## In which our man in Washington contemplates the virtues of urban planning, literacy, and marriage

By Michael W. Lynch

**Date: Sat, February 20, 1999 4:49:49 PM**
**From: mlynch@reasondc.org**
**Subj: TOD Declared DOA in D.C.**

A few days back, I received an e-mail: "After reading Virginia Postrel's recent editorial on smart growth," a transit expert named John Niles cryptically advised, "I'm pretty sure you'll find this briefing...interesting."

"This" was a seminar on sprawl, sponsored by the Denver-based Center for the New West. So there I was at the Washington Metropolitan Area Transit Authority (Metro) building, clutching a cup of Starbucks and staring down at a sign-up sheet listing names from the Federal Transit Administration, the American Planning Association, the Sierra Club, and a pile of unfamiliar acronyms, such as CUED and FHWA. No sign of Al Gore, America's new urban-planner-in-chief. I was thankful for that.

Sprawl, as you know, has become one of the hottest new national issues. In an era without a cold war, where everyone who wants a job has one and the government even takes care of the erectile problems of poor men by passing out Viagra, I guess it makes sense that hard-to-find parking places in suburban malls would catch the attention of the would-be next president.

Deconstruct the issue: People who complain about sprawl, insofar as they live in it, are people who have fled crowded cities, where they hated their small houses, had to fight for parking, disliked their neighbors, and couldn't stand the schools. Now they are upset that others, who hated their small houses, had to fight for parking, disliked their neighbors, and couldn't stand their schools, did the same. Why move to the suburbs if the problems of the city follow? It makes a sort of sense.

It's the "proposed solutions" that leave me scratching my head. We have plenty of open space. Anyone who ever climbs off a bicycle and boards an airplane knows this. So let's break out the dozers, scrapers, and backhoes, and build some housing pads and roads, and make this suburban thing work. Unthinkable.

Instead, the pony-tailed planning crowd wants to turn the suburbs into the city by building small houses, one on top of the other, with little parking and narrow roads. And since bus stations have long been the focal point of communities everywhere, they imagine people will gladly give up their suburban ranch houses for 19th-century row houses so long as they have a transit station in the neighborhood. This is called the New Urbanism or, in bureaucratic speak, Transit Oriented Development (TOD).

Hence yesterday's presentation, "Measuring the Success of Transit Oriented Development: Retail Markets and Other Key Determinants." As I waited for it to start, it struck me that I was covering not Washington politics but a city council meeting in some granola-infested town, like Davis, California, where I spent my childhood. The room was filled with 40 or so bureaucrats looking for any relief from their drab cubicles and busybodies who live to enlighten others through regulations. A mustached man in a dark suit, his graying hair pulled back in a ponytail, pranced about the room, sporting a large white button proclaiming "Mass Transit." (This fellow owns a bike that folds into a G.I.-style duffel bag and, I would later learn, has a broad vision for humanity: "We can be more than commuters.")

The presenters, Dick Nelson and e-mailer John Niles, were consultants from Seattle. "We are not professional planners," said Niles, "but policy wonks. ...We are here for feedback." While they never actually came out and said it, Nelson and Niles had one message for this crowd of professional planners: Americans are a wealthy people, shops are located in many places, and we like to drive to them. So TOD, like most of your other bright ideas, will fail.

Niles' main evidence for this claim, which formed the bulk of the presentation, concerned the locations of popular retail stores. Only 20 percent of car trips are for work. So to cut out trips, one must locate everything on a transit line, which must also be located close to residential housing. Niles calls such things as good restaurants, price clubs, and Home Depot "trip generators." And "trip generators" ruin planners' schemes.

Niles and Nelson knew the crowd was hostile, so they stuck to graphs, charts, and maps and let audience members form their own conclusions. (The presentation can be downloaded at www.globaltelematics.com.) Some listeners just didn't get the point.

One woman interrupted toward the end to ask what category they put gourmet-food chain Trader Joe's in—big stores or specialty stores? Mini-superstores, they said, precisely the type of shop that is a "trip generator." People drive to Trader Joe's, as I did in San Francisco even though I could have walked to a half-dozen other stores to buy similar products. This behavior never occurred to the questioner. She felt that Trader Joe's might cut down on traffic because they are a "progressive" company, meaning that people like her might convince them to locate near bus stations.

HENRY PAYNE

The TOD people want to "shift paradigms," so Americans give up the convenience of their cars for the stench of the bus or the crowd of the commuter train. A fellow with a pinky ring and a patch over his left eye said we have to "up our ambitions by a factor of 10." A particularly agitated fellow from Metro called the presentation of facts "counterproductive." He declared, "If oil goes to $20 a barrel, people will have to go back to the inner city."

The bike-in-the-bag mass transit enthusiast was soon up. He's a classic type—a true lunatic who can never quite believe that he isn't asked to present on the hundreds of panels he attends each year. He puts up with the experts as the price of getting his hands on the microphone in the Q&A period. He rambled about bicycling in the suburbs, told of a girl upset by a fender bender that could have been avoided if she'd just grown up without worries on a bus, and decried how business exists only to make a profit.

Near the end, Phil Burgess, president of the Center for the New West, obviously couldn't stand it any longer. He grabbed the microphone and gave a little speech himself, one grounded in a reality that escaped many in the room and was being actively wished away by the others. His message was simple: The cost of commuting in cars is lower than ever, with gas cheap and wireless phones allowing work while stuck in traffic. This means that the benefits of mass transit must become even greater to compete. By this time, many of the bureaucrats had left.

**The bike-in-the-bag mass transit enthusiast was soon up. He's a classic type—a true lunatic who can never quite believe that he isn't asked to present on the many panels he attends each year. He puts up with the experts as the price of getting his hands on the microphone in the Q&A period.**

I told Burgess afterward that his point was well taken. I then headed to the Metro station for my subsidized ride back to the office.

**Date: Tues, March 2, 1999 2:03:14 PM**
**From: mlynch@reasondc.org**
**Subj: Child's Play**

I didn't know the National Education Association was involved. I didn't know it was a national pseudo-event. All I knew was what the first few lines of the Speaker's Media Advisory told me: "As part of an effort to increase literacy in the classroom, Speaker J. Dennis Hastert (R-Ill.) on Tuesday will read the Dr. Seuss classic, *Green Eggs and Ham* to a class of kindergarten children at Peabody Elementary School in Washington, DC." This, I didn't want to miss.

Education is a pressing matter. The Elementary and Secondary Education Act, the vehicle through which Washington


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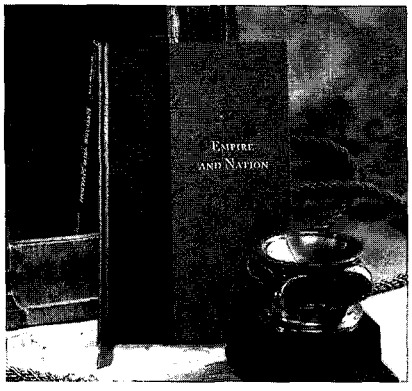


Two series of letters that have been described as "the wellsprings of nearly all ensuing debate on the limits of governmental power in the United States" are collected in this volume. The writings include *Letters from a Farmer in Pennsylvania*—the "farmer" being the gifted and courageous statesman John Dickinson and *Letters from the Federal Farmer*—he being the redoubtable Richard Henry Lee of Virginia. Together, Dickinson and Lee addressed the whole remarkable range of issues provoked by the crisis of British policies in North America, a crisis from which a new nation emerged from an overreaching empire. Dickinson wrote his *Letters* in opposition to the Townshend Acts by which the British Parliament in 1767 proposed to reorganize colonial customs. The publication of the *Letters* was, as Philip Davidson believes, "the most brilliant literary event of the entire Revolution." Forrest McDonald adds, "Their impact and their circulation were unapproached by any publication of the revolutionary period except Thomas Paine's *Common Sense*." Lee wrote in 1787 as an Anti-Federalist, and his *Letters* gained, as Charles Warren has noted, "much more widespread circulation and influence" than even the heralded *Federalist Papers*. Both sets of *Letters* deal, McDonald points out, "with the same question: the never-ending problem of the distribution of power in a broad and complex federal system." The Liberty Fund second edition includes a new preface by the editor in which he responds to research since the original edition of 1962.

**Forrest McDonald** is Professor of History at the University of Alabama and author also of ***E Pluribus Unum,*** among other works.

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distributes a portion of our tax money to government schools across the country, is up for reauthorization. The president has proposed a $1.2 billion increase in federal spending, to bring the total to just under $35 billion, or roughly $350 per American household.

Long gone are the days when Republicans felt the need to make the principled case against federal meddling in education. Now we get Senate Budget Committee Chairman Pete Domenici (R-N.M.) attempting to outspend the president. "This president will be labeled the education president of the United States, having spent less money to get that label than anyone in America knows," Domenici complained in February. He wants Republicans to bump the money up to $40 billion.

I climbed out of the cab at 11:50 a.m. and gazed at the four-story faded-brick building. The white trim of the window frames dripped downward from the corners, like tears. It seemed dilapidated enough to be a D.C. school. A sign in front confirmed my suspicion: "Peabody Early Childhood Campus."

I headed into the press-filled room where the reading was slated to occur. Six TV cameras were mounted and ready to capture the moment, which I discovered was just one event in the National Education Association's "Read Across America Day." Jesse Jackson had, just that morning, read to 300 kids at the NEA's Washington headquarters.

At 12:05 p.m., a voice announced through the intercom, "All students who will be participating in the reading by the speaker, will you line up outside the door, quietly."

The 30 or so children were soon escorted in and seated on the floor, and each was handed a white and red striped Cat in the Hat hat. A man in front quipped, "It's like herding cats." He laughed. The woman doing the herding didn't. As photographers swarmed around the children, another fellow said, "They get a 10 on the cute-o-meter." The two women in front of me, both reporters, were gushing.

The kids soon got tired of wearing their hats, and took them off to hit each other. As Speaker Hastert stood on the side with a dumb smile, the kids responded to questions posed by reporters: "I'm 5." "I'm in kindergarten." "I'm 4." "I'm 6." "I'm in pre-kindergarten." The woman in charge quieted the room. "Can you say Speaker Hastert?" she asked. In not quite unison, the reply came, "Speaker Hastert."

As soon as Hastert sat down, it was clear that this man was in his element. He started by showing the kids his tie, which had a large picture of the Cat in the Hat. He did stumble a bit early, telling the kids, "You're going to be able to read *The Cat in the Hat* all by yourself. But not quite yet," when some of the older ones already can read and told him so. And one of the kids outflanked him technologically. When Hastert announced that he would read *Green Eggs and Ham*, an adorable voice announced, "I have the CD."

But the speaker recovered quickly. "Let's read," he began, ending the small talk. "The first page says, 'I am Sam,'" to which the kids responded, anticipating the next line, "Sam I am." Hastert is a pro at reading to kids. He read slowly, never tripping over a word or breaking the cadence. He swiveled in his chair, providing a panoramic view of the pictures, pausing at times to editorialize on their larger meanings. He was patient. When the kids got excited and started to jabber on loudly, he would simply hold up his thumb like an ace pilot, which calmed them down. Unflustered, he'd continue.

I wasn't the only one to notice his skills. One woman there for the event, Noel Brazil, was particularly impressed. Her son, now a sixth-grader, was once among the 200 at this school, and she liked how Hastert dominated the kids with his thumb. "I hope he can go back to Congress and do it," she told me.

As Hastert finished, the Cat in the Hat himself entered the room, bumping his head on the doorframe. The Cat delivered a plate of green eggs and ham to Hastert, who quickly announced that there was enough for all. The Cat bobbed behind Hastert, grasping its tail, while Hastert passed out plates of green eggs and ham.

A little girl started to howl with horror. "Don't worry, he's not going to bite you," her mother said, holding 4-year-old Aniya close. "He's just a storyteller." As the howls turned to cries and the cries gave way to hushed sobs, I asked the mother who had frightened her little girl: Hastert or the Cat? She said it was the Cat, and that Aniya liked to read and was a good student.

As the children handed green egg–filled plates back to Hastert, I asked Miles Johnson, age 5, what he thought of the food. He claimed not to eat pork, and he didn't much like the color of the eggs. "Why couldn't they have red eggs, or yellow eggs?" he kept asking, not quite grasping the theme.

As a final act, the ample Hastert accepted a shirt and a certificate from the NEA and the Cat. After assuring the children that the large shirt would fit, the speaker made a gracious exit. Back to the work of the American people.

**The Cat bobbed behind Hastert, grasping its tail, while Speaker Hastert passed out plates of green eggs and ham. A little girl started to howl with horror. "Don't worry, he's not going to bite you," her mother said.**

**Date: Thurs, March 11, 1999 10:00:50 AM**
**From: mlynch@reasondc.org**
**Subj: Shacking Up**

Shacking up was the subject. The Heritage Foundation was the location. "Should We Live Together? What Young Adults Need to Know about Cohabitation before Marriage," a report from The National Marriage Project, provided the evidence.

The report's conclusion, according to my luncheon invitation, is that "living together before marriage increases the risk of breaking up after marriage." This is completely counterintuitive. It's akin to a market research firm claiming that individuals who test-drove cars before purchasing them are less satisfied with their vehicles than individuals who made the commitment to 60 monthly payments after viewing only the shiny exterior. When I explained the idea to my lovely wife, she said, "That's ridiculous."

It's less ridiculous, however, if you con-

sider the source. If the marketing firm were working for a Web-based retailer that maintained neither an inventory nor a showroom, one might expect the anti-test-drive finding. Similarly, an institution dedicated to virgin nuptials might find cohabitation deleterious. Or the claim could be true. To investigate, I once again found myself in the Heritage Foundation's Van Andel Center for a luncheon presentation.

David Popenoe, a Rutgers sociologist and the report's co-author, led with a few jokes. "The only people who seem to want to marry today are Catholic priests and homosexuals," he said, to a room of chuckles. He then told us both his daughters had cohabited before their still-successful marriages and thought he was "nuts" to do this study. He also tried to distance himself from claims of bias, saying he'd once been banned from a Catholic radio station because in his book, *Life Without Fathers*, he'd given a muted endorsement to shacking up, recognizing that sex outside of marriage is a fact of life. Back then Wade Horn of the National Fatherhood Initiative, who sat two seats over today, had asked him, "Why are you so in favor of cohabitation?"

Well, Wade, he's not any more. According to Popenoe's report, which assembles the findings of prior studies but includes no original research, shacking up leads to broken marriages, beaten women, and abused children. Popenoe called cohabitation a "stealth trend," noting that 30 years ago nobody was cohabiting "except people maybe in a trailer park." Today, it's over 50 percent of the people who eventually get married, and climbing.

The divorce statistic, near as I can tell from reading the report, is based on a 1992 study that itself was based on a 1987 data set that found a 46 percent higher risk of divorce for couples who shack up before marriage. In his talk, Popenoe claimed it was a "confirmed empirical generalization that cohabitation leads to an increased risk of divorce." Yet his study says merely that it "is beginning to take on the status...of an empirical generalization"—a difference with a distinction, and here we see how advocates work.

I do not doubt the figure from the 1987 data set, but it's not too relevant to the report's purpose, which is to tell young adults not to shack up lest they wind up divorced. The study didn't single out young adults, or look at young adults who cohabited vs. those who didn't. It compared a broad cross-section of people who lived together to an equally broad pool of those who didn't, mixing widely different populations. Popenoe and co-author Barbara Dafoe Whitehead even admit that as more young adults cohabit, the risk of divorce among those who've lived in sin is falling.

As I listened to Popenoe, I wrote a series of questions: "How many cohabitors have been divorced already before cohabiting?" "Are there different groups cohabiting: young, never-married adults; middle-aged; already divorced, etc.?" "Are there differences between men and women?" "He says divorce rate is related to age of marriage. But might the age of marriage be related to cohabitation?"

His answer to my first question was that he didn't know. Second: definitely, but the groups weren't broken out in studies. Third: didn't know. The last question was the real stumper.

Why do we care about the issue at all? For many in the Heritage room, it's disgust with premarital sex, homosexual sex, sex which leads to an orgasm but not a child, erections outside of the bounds of wedlock, short skirts in the workplace, etc. According to the study's authors, however, it's because of divorce.

And both Whitehead and Popenoe agreed that the biggest factor affecting risk of divorce is the age of first marriage—the later the wedding, the longer the marriage. It stands to reason, although I am told it hasn't been empirically tested, that cohabitation for at least some young adults is a short-term substitute for marriage and works to push back the age of first marriage. But if marrying later mitigates divorce, and cohabitation enables people to marry later, it's hard to see how cohabitation increases divorce.

The reason both relationships could be true, I imagine, is that the studies are dealing with disparate groups: Older, poorer, already divorced folks who then live with someone else are more likely to divorce than non-cohabitors. Younger people who live together and thereby postpone the age of first marriage may in fact be less likely to divorce.

What social scientists refer to as the "selection effect"—that people who cohabit are, as a group, more adverse to commitment that the population at large, and therefore more likely to split up—is no doubt also at work. This, Popenoe explained, has been the chief area where other academics have focused their attacks on his report. In retrospect, Popenoe allowed, he wished he had used more ink addressing this issue.

In the Q&A period, Wade Horn attacked the authors for obscuring the issue of sex outside of marriage. "It's just easier to have sex a lot if it's OK to have sex before marriage, if you're living with the person, than if you have to take them out to dinner first," he said. I turned to the woman to my left, and embellished, "Even better, you can have them make you dinner first." She didn't find any humor in my thoughts and soon left the room.

A red-faced fellow jumped in, complaining about the lack of focus on the real problem: premarital sex. My notes read, "People were pissed that they didn't piss on premarital sex."

What do these people hate more, premarital sex or divorce? Divorce, for very good reasons, many of which were first articulated by folks such as these, is out of fashion. So to be sure that they only walk down the aisle once, individuals put off marriage as they establish themselves financially and personally. But individuals also feel the urge to merge—consider it a biological thing.

The choices for young people are early marriage, cohabitation, casual sex outside of cohabitation, masturbation, or complete celibacy. Early marriage leads to divorce. So, in social scientific terms, it's bad. Casual sex is out, on any number of grounds. We know, thanks to Joycelyn Elders, what people think about public policy discussions of masturbation. Complete celibacy? The report itself raises this idea in a dismissive way: "Cold showers anyone?"

The preferred prescription for the Heritage crowd appears to be young marriage, driven by the desire for sex, and no possibility of divorce when the couple finds the sex has gone flat and they don't really like each other any more. But this idea, in the words of Popenoe, is not "saleable." So we get thin social science.

"If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."

# STARR TEACHERS

**Think independent counsels use dirty tricks? Check out the Justice Department's regular prosecutors.**

**By Harvey A. Silverglate and Andrew Good**

These words will strike many as an apt description of the way that Independent Counsel Kenneth Starr has pursued President Clinton. But they were uttered nearly six decades ago by Robert Jackson, who went on to an illus-

ILLUSTRATIONS: DAVID KLUG

DOJ
KLUG

trious career as a Supreme Court justice and an American prosecutor at the Nuremberg War Crimes Tribunal. At the time, he was President Franklin Roosevelt's attorney general, and he was addressing the ordinary federal prosecutors under his command. He was alluding to tactics that have since become common, practiced with a boldness that grows as federal judges communicate ever more clearly that they will neither supervise federal prosecutions (as they once did) nor remedy prosecutorial misconduct.

Intense media coverage of recent investigations by the Office of the Independent Counsel has resulted in widespread astonishment at the sort of abusive prosecutorial tactics that Jackson decried. In response, independent counsels have protested that they are merely doing to their lofty targets what the Justice Department regularly does with impunity to lesser ones—that is, they are following accepted DOJ procedures. Late last year, Starr's spokesman, Charles Bakaly III, told the *Legal Times*, "However unpleasant these techniques, they are part of what federal prosecutors do.... We followed longstanding practices and policies."

Shocking though it may seem, Bakaly was speaking the truth. But if the use by independent counsels of tactics that are common among Justice Department prosecutors is cause for well-founded public concern, the proper response cannot be merely to reform or do away with the independent counsel statute. Rather, the criticism of Starr and other independent counsels points to the need for much more sweeping changes in the way all federal prosecutors operate.

A key Justice Department tactic in overzealous investigations, emulated in Starr's stalking of Clinton, is to pursue one's quarry by going after a chain of people toward the end of which are some who, by virtue of their current or former relationship with the ultimate target, are in a position to provide seemingly credible incriminating testimony. A basic premise of such investigations is that, unless an intermediate target is threatened with ruin and imprisonment, he will have no incentive to provide testimony that suits the prosecutor's needs.

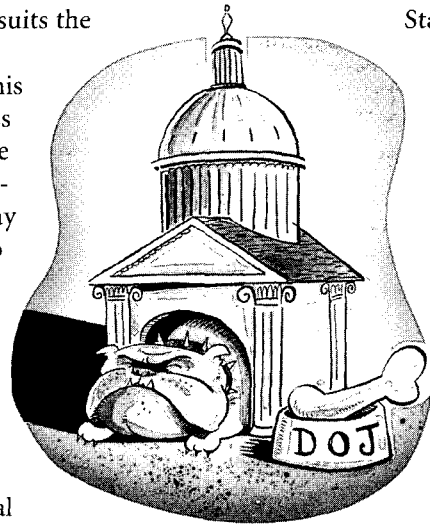
The most serious problem with this approach, of course, is that a witness who is placed under sufficient pressure to corroborate the prosecutor's firm belief in the ultimate target's guilt may have a hard time resisting the urge to compose as well as sing. A collaboration between prosecutor and witness then proceeds, wherein the witness learns, by a process sometimes subtle and sometimes not so subtle, what he must say to stay out of prison. Often a witness does not have to deviate too far from the literal truth to satisfy his handlers, since there are many federal offenses for which legally sufficient evidence of guilt consists of nothing more than what a target is alleged to have said. An enormous variety of rather common undertakings in political and commercial life can be transmogrified into federal crimes simply by virtue of the target's intention, which in turn may be demonstrated by something he is alleged to have said to someone who later became a government witness.

Conspiracy, for example, is a favorite weapon in the government's arsenal, because the crime is committed merely by the target's agreement with an associate that the latter should violate a law. Securities fraud is another such weapon, since a savvy stock investment becomes insider trading if the investor, already suspected or accused of some crime, credibly attributes his stellar results to an overly informative conversation with a targeted corporate officer. Similarly, an innocent error on a net worth statement filed in support of a loan application becomes a federal bank fraud if an associate of the borrower recalls a conversation in which the borrower happened to mention an asset value lower than the figure used on the statement. The comment proves knowledge and intent, which are required elements for most felony prosecutions.

With such recollections, a little fish reeled in by a prosecutor can wriggle off the hook by helping to ensnare a seemingly bigger fish. If the bigger fish is already on the prosecutor's sonar, so much the better.

We have firsthand experience with these tactics, as do most prosecutors and defense lawyers, nearly all of whom operate under a tacit agreement to refrain from speaking publicly about how the system works. Prosecutors believe the public would not understand the need for such tactics; law enforcement thus joins sausage making and legislating as processes that should not be observed too closely. Prospective witnesses and their lawyers share with prosecutors an interest in keeping hidden the subtle pas de deux—innocuously dubbed "plea discussions" or "immunity negotiations"—that results in the intermediate target's agreement to become a witness.

This tradition of discretion helps explain Kenneth Starr's barely concealed disgust with the behavior of Monica Lewinsky's former lawyer, California malpractice specialist William Ginsburg. Ginsburg's highly publicized and undisguised offers to have his client provide helpful testimony against the president in exchange for immunity from prosecution for perjury pulled away just enough of the curtain to alert the public to the enormous pressures placed on witnesses to "cooperate." Since it was no secret what Starr thought Clinton did, it was not difficult for a witness to figure out what to say to obtain immunity or avoid a perjury indictment.



The same strategy was followed in a case in which our firm participated in the mid-1980s. U.S. Attorney William F. Weld (who later became governor of Massachusetts) launched his political career by engaging in a highly publicized investigation into the administration of Kevin H. White, then the mayor of Boston. Weld attributed his inability to turn up evidence of White's corruption not to the possibility that White might not have been corrupt but rather to a conspiracy of silence among lower-echelon city officials and businessmen with lucrative city contracts.

Weld's assistants began a systematic effort to "climb the ladder" at city hall, with the goal of eventually reaching high officials who could testify to corrupt dealings or conversations with the mayor himself. They targeted as the perfect witness Theodore V. Anzalone, our client, a Boston lawyer who from the earliest days of the White administration had held a variety of important posts, including the unofficial position of the mayor's most effective fundraiser. Adequately squeezed, Weld and his staff believed, Anzalone would give them Kevin White.

The prosecutors got their big chance with George N. Collatos, a low-level city hall operative who was reputed to be always ready for a profitable opportunity. In 1981, when a city contractor complained to the FBI that Collatos, then an employee of the Boston Redevelopment Authority, was trying to shake him down, the bureau wired the contractor, who then paid a $12,500 bribe to Collatos in a monitored transaction. Collatos was convicted of extortion and sentenced to three years in prison.

Three months later, Collatos was hauled before a federal grand jury, granted immunity from further prosecution for past acts, and questioned about corruption in the White administration. He was indicted for perjury when he denied soliciting and receiving financial contributions for White's 1979 re-election campaign. Collatos pleaded guilty. Weld's assistant prosecutor told the sentencing judge that Collatos' refusal to implicate higher-ups "demonstrated his need for rehabilitation." The prosecutor made it clear that, after sentencing, Collatos would be called yet again before the grand jury. The sentencing judge, W. Arthur Garrity, sentenced Collatos to an additional two years in prison, while indicating that he could get a reduction if he cooperated with Weld's office. "I saw the handwriting on the wall," Collatos wrote in a remarkable 1984 article for the now-defunct *Boston Observer*. "So I decided to take Garrity up on his order."

Despite the fact that Collatos was found to be "deceptive" during an FBI-administered polygraph exam, Weld's office obtained an extortion indictment of Anzalone based on Collatos' testimony. Collatos claimed that he obtained an $8,000 "political contribution" from a city contractor and dutifully turned the cash over to Anzalone for the White re-election campaign. It was a perfect example of the ease with which a malefactor can become a star witness rather than a long-term prisoner. If the money had stuck to Collatos' palm, he would head to prison, but if he had passed it along to Anzalone, he would be a free man. Six months after he began cooperating, Collatos was released on parole.

The government did not get what it bargained for, however. Behind the backs of his handlers, Collatos made the mistake of trying to gain money as well as liberty from his new role. He sought a secret meeting with Anzalone, at which Collatos threatened to repeat at Anzalone's upcoming trial what he admitted would be false incriminating testimony, unless Anzalone paid him $200,000. Unbeknownst to Collatos, Anzalone had wisely notified his lawyers in advance. We arranged for the conversation to be monitored by two witnesses hiding under a trap door below the restaurant table where Collatos and Anzalone met. (We were unable to surreptitiously record the meeting, because in Massachusetts such taping is lawful only when done by government agents.) Informed of Collatos' secret threats to lie if not paid, Anzalone's jury acquitted him.

**In the warped vision of federal prosecutors, only their brand of witness tampering is compatible with proving the truth and assuring that justice is done. Only prosecutors have unfettered power to decide what testimony is worth buying and how much the public should pay.**

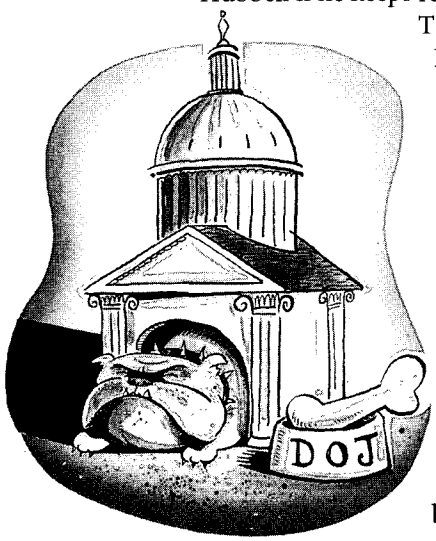
The government, unhappy with the surprise defense witnesses who emerged from the restaurant cellar, initially threatened the witnesses and us with prosecution for obstruction of justice and the ancient but little-known crime of "misprision of a felony." (The latter offense is committed when a citizen witnesses a felony and fails to report it to the government, although the courts generally have required a bit more active obstruction than merely withholding information.) When the prosecutors came to their senses (after their superiors in Washington became aware of the widely reported disaster), they dropped these charges and instead indicted Collatos once more—this time for his perjury in the Anzalone trial. He was convicted and sentenced to two years.

The government finally gave up trying to turn Collatos into a government witness against Anzalone. Collatos, alas, had attained a degree of criminality and unreliability, springing from an apparent inability to tell the truth, that at long last disqualified him from meeting the very low threshold of probity and credibility that one needs to be a valued and rewarded government witness. Having no hopes of applying pressure on Anzalone to compose and sing a song of mayoral corruption, the feds gave up their pursuit of him and hence of Mayor White.

This sort of scenario is commonplace in federal prosecutions, so it was natural for Kenneth Starr and his deputies to swing "cooperation" deals with the likes of convicted former Arkansas judge David Hale and admitted felon and former Clinton business partner James McDougal (who died last year). It did not matter that neither of them implicated Clinton in the Whitewater swindle of McDougal's federally insured Madison Guaranty Savings and Loan Association until after being convicted of a felony and sentenced to prison.

Nor did it make a difference that McDougal's estranged wife, Susan, was loudly proclaiming her refusal either to accept Starr's offers or to accede to his threats seeking her testimony. She claimed she knew nothing criminal that Clinton had done, that her husband was an inveterate liar willing to sell his soul in exchange for Starr's leniency, and that she would (as she did) go to prison for contempt rather than play the role that Starr had designated for her. When imprisonment for "civil contempt" failed to loosen her tongue, Starr's office took advantage of an unfortunate legal loophole that allows uncooperative witnesses to be punished a second time, notwithstanding the constitutional protection against double jeopardy. This time he had her indicted for *criminal* contempt, and she is now awaiting trial.

Starr's effort to bludgeon former Associate Attorney General Webster Hubbell into testifying against the Clintons also seems unlikely to elicit the truth. Early in Starr's investigation, Hubbell pleaded guilty to charges of stealing from the Rose Law Firm in Little Rock, a theft that victimized Hillary Clinton, then his law partner, and the firm's clients. That guilty plea makes the Clintons look more like Hubbell's victims than his criminal accomplices. It also makes it plain that, when it was in his interest to do so, Hubbell acted dishonestly. Notwithstanding Hubbell's demonstrated lack of probity, Starr wants him to become his witness against the Clintons in the Whitewater investigation and is attempting to destroy Hubbell if he keeps refusing.




To be sure, Starr's suspicion that Hubbell's recalcitrance has been bought through a scheme to obstruct justice is understandable. But Starr's overreaching tactics may well stymie the investigation. While imprisoned for his thefts from the Rose Law Firm, Hubbell received consulting fees from an offshore source of Clinton campaign funds, the Riady family, and from Revlon (the same company that offered a job to Monica Lewinsky on Vernon Jordan's recommendation). Hubbell also received a sizable advance from a book publisher in exchange for a promised manuscript. Starr subpoenaed Hubbell's financial records showing what he did with the proceeds of these deals, and Hubbell validly invoked the Fifth Amendment, claiming that the records might tend to incriminate him. In response, Starr granted Hubbell immunity from any prosecution which might be aided, directly or indirectly, by the records.

Yet in April 1998, hoping to crack Hubbell's resistance against becoming a Starr witness, the independent counsel indicted Hubbell and his wife for tax-related crimes in connection with Hubbell's receipt and disposition of the money from his various jailhouse deals. The appeals court reviewing the case has expressed doubt that Starr will be able to prove that the evidence he wants to use against Hubbell comes from sources untainted by the information in Hubbell's immunized records. Starr's case against Hubbell may suffer a fate similar to Independent Counsel Lawrence Walsh's case against Oliver North, in which he failed to obtain a conviction because he could not show that his evidence was untainted by the colonel's immunized congressional testimony.

By charging Hubbell's wife, Starr has copied the Justice Department's common tactic of exerting pressure on potential witnesses by indicting people close to them. His prosecutors reportedly used the same tactic with Monica Lewinsky, threatening to charge her mother with obstruction of justice. In our practice, we have seen federal prosecutors take this approach several times, with prominent clients such as Michael Milken (who pleaded guilty in exchange for dismissal of charges against his brother) as well as less famous people. Despite the threat to his wife, Hubbell, like Susan McDougal, continues to insist that he has no incriminating information about the Clintons.

When a witness testifies in a way that might exculpate the target, prosecutors can be vengeful. Julie Hiatt Steele insisted that Kathleen Willey, who accused the president of groping her, had asked her to lie and that her earlier statements supporting Willey's story were false. As a result, Steele has been indicted for obstructing justice and making false statements to a federal agent. (Unbeknownst to many citizens, it is a felony to lie to any federal official, under oath or not, and typically it is the official's version of what was said that prosecutors credit.) Steele, a single mother of an 8-year-old, could face years in prison. She understands that, like Lewinsky, Hale, and Jim McDougal, she will receive immunity only if she will change her story and tell the "truth" as the prosecutors see it.

It is unclear, of course, whether Susan McDougal, Webster Hubbell, and Julie Hiatt Steele, or James McDougal and David Hale, have told the truth. What is clear is that the techniques used by prosecutors to influence witnesses cast doubt on the government's ability to uncover the facts.

In the warped vision of federal prosecutors, only their brand of witness tampering is compatible with proving the truth and assuring that justice is done. Under existing law,

only prosecutors have unfettered power to decide what testimony is worth buying and how much the public should pay for it in the form of immunity, money, and liberty. Only prosecutors have the power to threaten and actually prosecute witnesses who insist that the facts do not conform with the government's version of the truth. When prosecutors have so much power to influence evidence through rewards and intimidation, the danger they pose to truth and justice is clear.

This concern was at the heart of a remarkable ruling last year by a three-judge panel of the U.S. Court of Appeal for the 10th Circuit. The decision involved a federal law against bribing witnesses that begins, "*Whoever*...directly or indirectly, gives, offers, or promises anything of value..." (Emphasis added.) The judges concluded that the prohibition applies not only to bribes by private actors but also to enticements by agents of the government, including offers of leniency. "If justice is perverted when a criminal defendant seeks to buy testimony from a witness," they wrote, "it is no less perverted when the government does so." The decision caused an uproar among prosecutors, and in early January it was reversed upon rehearing by nine other judges on the court. These judges apparently had grown so inured to the government's witness tampering that they could not imagine how the criminal justice system could function without it.

Sometimes, despite all the pressure it can bring to bear, the government still cannot elicit testimony to back up a particular charge. If, after years of effort, the activities that prompted an investigation cannot be proven to be criminal, the overzealous prosecutor can imagine only one explanation: The target must have obstructed the investigation by tampering with witnesses and suborning or committing perjury. The scope of the inquiry then expands to cover the target's activities during the investigation.

Therein lies the answer to a frequently asked question: Why has Starr's investigation lasted more than four years and cost more than $40 million, with no end in sight? A federal investigation need not have a foreseeable end. Even if the suspected crimes that triggered the investigation can no longer be prosecuted because of the statute of limitations, new crimes of obstruction come into the prosecutor's sights, and the time clock begins to run all over again.

If, as happened in Starr's investigation of Clinton, no prosecutable case can be made against the target for pre-investigation crimes, or for obstructing the investigation of those crimes, there is always another avenue: the perjury trap. An intense investigation of virtually anyone will usually find something that the target will lie about to protect either a loved one or himself. Starr knew that, as with many other people, the thing the president was most likely to lie about was his sex life. Having heard the famous telephone tape made by Clinton paramour Gennifer Flowers, the independent counsel knew that the president was a flawed human being with a propensity to lie (and to advise others to lie) about sex.

In the nether world of prosecutorial logic, a federal investigation of the Monica Lewinsky matter was justified by the gossamer connection between the president's alleged efforts to cover up his complicity in the Whitewater bank fraud—a charge that has never been made, much less proven—and his easier-to-prove efforts to conceal his sex life from Paula Jones's lawyers. All that remained was for the prosecutors to call the president before a federal grand jury, and the jaws of the perjury trap would slam shut. The only possible escape was for the president to rely on a tortured legal parsing of *sexual relations* to protest his innocence of perjury during his deposition in the Jones suit and, in the face of the semen-stained dress, to admit his sexual involvement with Lewinsky. Whether his attempted escape from the perjury trap set for him by Starr constituted a high crime or misdemeanor justifying his removal from office became the subject of his impeachment and his trial in the Senate.

**Targets can be investigated for violating any one of thousands of laws and regulations. This body of law is so vast that, according to an American Bar Association panel, "there's no conveniently accessible, complete list of Federal crimes."**

The perjury trap was used in a somewhat different fashion by federal prosecutors during their investigation of former Boston Mayor Kevin White. In Boston, as in many cities, real estate developers often fall prey to city inspectors who extort money through their power to delay or deny needed permits. Paying small cash bribes to city officials is usually not a violation of federal law. But William Weld's prosecutors hoped that if they entrapped a real estate developer into paying illegal tribute to one of these predatory inspectors, he might lie about it when questioned by the federal grand jury. At that point, they figured, they'd have enough leverage over the developer to force him to divulge evidence about graft involving the mayor.

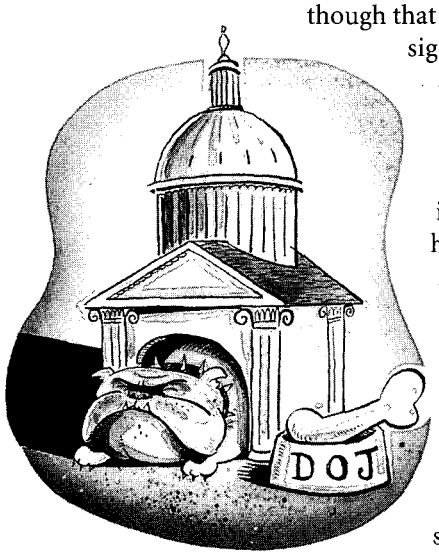
The feds easily caught a minnow: a building inspector extorting graft from a small-scale developer. Threatened with prison, he quickly agreed to wear a wire for the feds while shaking down a large-scale developer who needed permits for a housing project. The crooked inspector readily issued a permit to install a foundation for the project but then refused to allow the developer's construction crews, which were standing idle at the building site, to erect anything on the foundation. The developer, who

later became our client, instantly understood what was wanted; he paid $1,000 to the inspector, who recorded the event on an FBI-supplied tape recorder.

Weeks later, the federal prosecutors called the developer before the grand jury. Fearing that he'd never get anything built in Boston if he told the truth, the developer lied when asked whether he'd ever paid a bribe to a city official. Though he pleaded guilty in federal court to a related charge, the developer never provided the sort of testimony that the perjury trap was designed to elicit, because he had nothing incriminating to say about the mayor.

Since the law books today are filled with an even greater assortment of crimes than they were when Robert Jackson was attorney general, a federal prosecutor has an almost certain chance, not just a "fair" one, of being able to pin some violation of law on virtually any citizen. In Jackson's era, one spoke of the feds "throwing the book" at their target. Nowadays, targets can be investigated for violating any one of thousands of laws and regulations filling an entire library of fine print and undefined arcana. This body of law is so vast and scattered that, according to a February report from an American Bar Association panel chaired by former Attorney General Edwin Meese III, "there's no conveniently accessible, complete list of Federal crimes."

Federal laws now criminalize many activities that the average person would not necessarily view as immoral or anti-social, much less felonious. This is true in such fields as antitrust, campaign finance, currency transactions, customs and export laws, environmental protection, firearms, Medicare and Medicaid, patents, copyright and trademark infringement, securities, and taxation, to name just a few. For example, a 1993 case in the 1st Circuit involved a New Hampshire man in the midst of an acrimonious divorce who made small cash deposits in his business partner's bank account to make it more difficult for his wife's lawyer to locate his assets. He and his partner were prosecuted for violating the federal law against money laundering, even though that statute is aimed at transactions designed either to conceal the criminal origin of money or to evade taxes. The government conceded that the man had earned the money legitimately and had reported the income on his tax returns. Yet he and his partner were convicted for money laundering, verdicts that were thrown out on appeal.




The pervasive web of federal laws governing many areas of private and public activity provides federal prosecutors with a rich supply of often vague words and phrases to bend and blend and string together in ever more creative ways to establish that a targeted individual has committed a felony. People whose activities may be covered by these complex laws often either do not know about them or do not understand them to prohibit activities deemed unlawful by the government. The target will sometimes find himself under investigation or prosecuted for doing something that he had no reason to believe was illegal. Indeed, by redefining long-accepted meanings of words and phrases used in federal laws, prosecutors are able to charge the target with violating crimes that were entirely unknown at the time he acted.

Independent Counsel Donald Smaltz's case against former Agriculture Secretary Mike Espy illustrated this approach. Smaltz was appointed to investigate whether Espy's acceptance of gifts and travel from companies whose businesses his department regulated constituted not just violations of ethical rules (Espy was forced to resign) but felonies. The law that most nearly fit the facts is the one that prohibits federal officials from "accepting anything of value personally *for or because of any official act* performed or to be performed by such official or person." (Emphasis added.)

Smaltz spent years and millions of taxpayers' dollars trying to generate evidence that the blandishments Espy accepted were linked to "any official act" but came up empty. One might think that, if the facts did not fit the definition of the crime, Smaltz would have declined to prosecute. Instead, he aped Justice Department tactics, prosecuting Espy by retroactively redefining the crime to fit the facts.

Smaltz took the position that the statute should apply to gifts motivated by the receiving official's status or position, regardless of whether there was any intent to affect or reward "any official act." Fortunately for Espy, this theory was first tested in Smaltz's prosecution of Sun-Diamond Growers of California for its gifts to him. Sun-Diamond's conviction was thrown out on appeal because, at Smaltz's urging, the judge had instructed the jury that no link had to be proven between the gifts and any official act by Espy. The U.S. Court of Appeals for the District of Columbia Circuit concluded that Smaltz was prosecuting Sun-Diamond and Espy for a nonexistent crime. Smaltz went ahead with the Espy trial anyway, and Espy was acquitted by the jury.

You need not be a Cabinet official to be prosecuted by the Justice Department for committing an offense invented after the fact. We represent two businessmen in two different industries who have suffered this fate.

One of these men is the principal executive and owner of Fiber Materials Inc. (FMI), which sells equipment used to manufacture heat-resistant carbon-carbon. The export of such equipment is subject to Commerce Department regulation because sometimes it is "specially designed" to produce weapons-grade carbon-carbon, a substance used in missile warheads and rocket nozzles. Alternatively, the equipment may be "dual use," capable of producing either weapons-grade carbon-carbon or less rarefied prod-

ucts used to make brake pads for aircraft and other nonmilitary products. Since the beginning of the Cold War, arms control regulations have banned the export of "specially designed" equipment without a shipment-specific license but have permitted the export of "dual use" equipment, subject to a less restrictive Commerce Department general destination license.

In 1988, FMI shipped to an Indian defense research institute equipment that included a control panel everyone agreed was dual use. In retrospect, the Commerce Department worried that the control panel might contribute to India's arms race with Pakistan and China. Rather than change the regulations to embargo future shipments of similar dual use equipment, the government prosecuted FMI based on a new interpretation of the law. The prosecutors convinced the trial judge to instruct the jury that, despite years of the Commerce Department's consistent and contrary usage, the phrase *specially designed* referred to dual use equipment, thus assuring convictions for failure to obtain a special export license. A sentence still has not been imposed four years after the trial, and the verdict remains under legal attack based on a steady stream of evidence that the government changed the meaning of *specially designed* only after the shipment occurred, for the sole purpose of prosecuting FMI.

Our other direct experience with retroactive criminalization involves *safe and effective,* the keystone phrase of Food and Drug Administration regulations. The FDA approves drugs and medical devices for sale and distribution only if they are "safe and effective under the conditions of use and warnings against unsafe use in the approved labeling." Hence the FDA requires manufacturers of drugs and medical devices to tell their customers, whether they are health care providers or patients, to "use only as directed."

The C.R. Bard Company manufactured and marketed a catheter used to improve blood flow through arteries clogged by heart disease. The FDA approved the catheter as "safe and effective" even though the manufacturer disclosed a small (1.7 percent) risk that the device could fail and injure patients if the warnings against unsafe use were not followed by physicians. Sure enough, although with less frequency than predicted, the device failed when physicians ignored the warnings against unsafe use. To better protect patients, C.R. Bard made changes to the catheter which had no effect on its safety or effectiveness under the approved conditions of use but which made it more resistant to failure when the instructions were not followed.

FDA regulations required approval of any change that affected safety or effectiveness. In the absence of notice to the contrary, C.R. Bard had every reason to believe that the phrase *safety and effectiveness* referred to "the conditions of use and warnings against unsafe use in the approved labeling." Since the changes had no effect when conditions and warnings were heeded, the company thought it could make the beneficial changes without waiting for agency approval.

The FDA and the Justice Department nevertheless indicted C.R. Bard and several of its executives, one of whom we represent, for making the changes without approval. As publicly traded companies frequently do even in dubious cases, the manufacturer pleaded guilty and paid a huge fine. Threatened with imprisonment, the executives all went to trial. Contrary to the position that the FDA had taken in several prior cases, the government argued that the law forbids any unapproved change that affects safety and effectiveness, even if the effect is relevant only when the conditions of use are ignored. Three of the executives were convicted and sentenced to 18 months in prison. They are free during their appeal, which is based partly on their claim that it is fundamentally unfair to punish them for violating a law that meant one thing before the fact and another after.

**Amending or eliminating the independent counsel statute might make life fairer for Cabinet secretaries and presidents, but it will not redress the gross imbalance that has been created between the power of federal prosecutors and the rights of ordinary citizens.**

A basic insight at the heart of our republic is that injustice inevitably flows from conferring uncontrolled power upon any agency of government and, even more so, upon any individual in government. The public is awakening to the fact that independent counsels exercise such power. Although run-of-the-mill federal prosecutors have to answer more directly to superiors in the Justice Department and are not quite as free to spend whatever it takes to convict their targets, they use the same tactics as the independent counsels with even less public accountability, since they are not subject to as much scrutiny. Amending or eliminating the independent counsel statute might make life fairer for Cabinet secretaries and presidents, but it will not redress the gross imbalance that has been created between the power of federal prosecutors and the rights of ordinary citizens. ◆

*Harvey Silverglate (has@world.std.com) and Andrew Good (agood@world.std.com) are criminal defense attorneys and partners in the Boston law firm Silverglate & Good. Silverglate is the co-author, with Alan Charles Kors, of* The Shadow University: The Betrayal of Liberty on America's Campuses *(The Free Press).*

# The "Hate State" Myth

**In Wyoming, there are a few bigots who don't like gays. In the media, there are a lot more bigots who don't like Wyoming.**

**In the wake** of the brutal October 1998 murder-robbery of University of Wyoming student Matthew Shepard, the news media, liberal gay rights groups, politicians, and others engaged in a national outcry for swift enactment of hate crime legislation. A hate crime law would, as Joan M. Garry, executive director of the Washington, D.C.-based Gay and Lesbian Alliance Against Defamation, put it, "protect Wyoming gays from the kind of horrors which Matthew Shepard and his family have had to endure." The Wyoming legislature responded in February by voting on several hate crime bills—including one that even included protection of particular occupations, such as ranching, mining, and logging, from "ecoterrorists." A House version of the bill was defeated in committee with a 30–30 tie. Two Senate versions were defeated in committee by wider margins.

National proponents of hate crime laws were quick to pass judgment: Wyoming, rather than being "The Equality State"—Wyoming's official motto, adopted after it became the first state in the nation to grant women the right to vote—was really the "Hate State." Even as Shepard's grieving parents reaffirmed on NBC's *Dateline* and in *Vanity Fair* that they did not want their son's death used in a campaign for hate crime legislation or any other political cause, groups such as the National Lesbian and Gay Task Force (NLGTF) inferred that the legislature had not merely declined to fight intolerance but itself embodied intolerance for failing to pass the bill. "If not now, when?" demanded NLGTF Executive Director Kerry Lobel. "We are extremely disappointed that Wyoming refused to take real leadership on this issue."

**By Robert O. Blanchard**

Such reactions fit into the "hate crime news formula" that has become increasingly popular since the early 1980s with the media, advocacy groups, academics, and liberal politicians—all of whom have vested interests in fomenting a sense of continuous social crisis. A product of the identity politics mindset that has come to dominate American society over the past two decades, the hate crime news formula uses widely recognizable and understood images—burning crosses and churches, neo-Nazi goose-steppers, and, most recently, the burned corpse of Billy Jack Gaither in Coosa County, Alabama; James Byrd, chained and dragged behind a pickup truck in Jasper, Texas; and Shepard's silhouetted body lashed to a Laramie, Wyoming, buck fence—to suggest that the United States is a seething cauldron of hate directed at members of unpopular groups. Although demonstrably false (even the statistics gathered by the advocates of hate crime legislation demonstrate there is thankfully no "epidemic" of such heinous acts), the formula remains popular, partly because it provides

**New York Minute: The Wild West setting of Matthew Shepard's murder augmented the standard hate crime news formula. *Of course*, the coverage implied, Wyoming is close-minded and homophobic. What else could it be? (Pictured: Manhattan vigil, October 19, 1998)**

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the media with a ready-made angle by elevating "ordinary" crimes to matters of urgent, national concern involving sexism, racism, and homophobia. Indeed, the formula provides big ratings and material benefits both to advocates and to their academic allies. And it provides politicians with the opportunity to engage in cost-free, camera-friendly symbolic activity.

With the Shepard case, the Wild West setting of the murder augmented the standard media narrative: *Of course*, the coverage implied, Wyoming's macho, frontier culture is closed-minded, bigoted, and homophobic—what else could it be? As an NBC reporter put it while standing outside a Laramie drinking joint, "At Wild Willies Cowboy Bar today, patrons said hate is easy to find here." Never mind that Wyoming was the first state to grant women the right not only to vote but to own property and to hold office; that it elected the nation's first female governor in 1924; that it ratified the Equal Rights Amendment in 1973; that it was at the forefront of a trend in the 1970s to repeal sodomy laws; and that in the 1990s, more than 70 percent of its voters rejected anti-abortion initiatives. For the media, Wyoming was a natural setting for such a bestial crime. As *The New York Times* editorial page intoned the day following Shepard's death: "Laramie, the home seat of [Wyoming's] university, is a small town with a masculine culture... [Shepard] died in a coma yesterday, in a state without a hate-crimes law."

## Local Outrage

As a Wyoming native (now living in Texas) and a gay man, I find such geographical stereotyping to be more than simply inaccurate and irresponsible. The coverage of the Shepard case delivers a damning lesson about the gross in-

ability of the hate crime news formula to explain complex social situations—and it demonstrates that when the media and advocacy groups are faced with the choice of responding to reality or simply sticking with their scripts, they almost invariably choose the latter. Indeed, had they bothered to get beyond superficial pronouncements, they might have crafted a very different—and much more accurate—tale, one that reflected the outrage and sadness of area residents and put their rejection of hate crime legislation in its proper context. Far from symbolizing the last frontier of intolerance, Wyoming instead has said no to identity politics and the divisive, separatist group consciousness that hate crime legislation both reflects and perpetuates. While it is surely misguided to hope that anything decent will come from a tragic and horrible death, drawing such a lesson might at least salvage some small scrap of good from Shepard's murder.

**Local Reaction: Laramie residents expressed nothing but outrage over Shepard's murder—and puzzlement over the lack of interest in similarly gruesome killings. (Pictured: A county sheriff addresses the media.)**

In December, I traveled to Laramie to cover the arraignment of Matthew Shepard's accused killers for *The Triangle*, a Texas-based gay newspaper. I was particularly curious to learn how the horrible crime and subsequent media frenzy affected Wyoming residents, including former classmates and lifelong friends. The lonely epicenter of the nation's Empty Quarter, Wyoming is seldom, if ever, on the national media's radar screen. There are exceptions—for example, when the president or another celebrity visits Jackson Hole or when Yellowstone National Park threatens to burn—but no one I talked to in Laramie could recall any event that generated anything close to the coverage of Shepard's homicide. As a local physician wrote in a column for a medical journal, "It was strange and disorienting for those of us in Laramie to be the focus of intense national publicity. For a while, we eclipsed the president and Kosovo as the top news story. News trucks were rolling down the streets, looking for people to interview. A friend from New York called to say that my wife was on national television; a crew had recorded the church service where she had sung. Tom Brokaw in the [hospital] emergency department, reporters in Burger King."

By the time I arrived, members of the national "media circus," as bemused and annoyed locals were calling it, had only recently folded up their tents and returned to their bicoastal media centers. Friends in Laramie expressed nothing but outrage over the Shepard murder. They said everyone in the local community and the whole state had been devastated by the killing. They were also outraged by other, equally savage murders that had shocked the community in the past year. In November 1997, the nude body of a 15-year-old pregnant girl was found in the foothills east of Laramie with 17 stab wounds; her 38-year-old lover, apparently angered by her refusal to seek an abortion, had left her to bleed to death. In the summer, an 8-year-old Laramie girl, visiting family in northern Wyoming, was abducted, raped, and murdered, her body later found in a garbage dump. A man with a history of heterosexual pedophilia was arrested and pleaded guilty. Though widely publicized within the state, these crimes garnered little to no coverage elsewhere, leaving my friends puzzled and disturbed. Why was the Shepard murder alone given such widespread, sensational coverage? Was it only because he was gay and, as a result, fit into a larger news narrative?

Those concerns were echoed by everyone I talked with on the subject, from the staff of the Laramie *Daily Boomerang* to Albany County law enforcement officials, from University of Wyoming faculty and students to waiters and other service workers. The *Boomerang* allotted considerable space to long letters to the editor expressing various degrees of disappointment and outrage at the national coverage of the Shepard murder. Many were bothered by the implication that the murder of a gay man was more horrific than other recent local homicides.

"Please," one representative letter from a woman in Douglas began, "the murder or death of anyone is tragic, but listening to all the media coverage of Matthew and then [to] have [other local murders] go virtually unmentioned, I felt a taste of bitterness and anger over this whole situation. Now I am hearing all

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the rhetoric for legislation to make penalties for hate crimes [harsher] than others are. I have difficulty understanding this mentality. Aren't all murders born of hate?" The *Boomerang* also ran stories on local critiques of national news coverage, including a public forum called "Hostility Bites" sponsored by the University of Wyoming Housing and Residential Life Office 11 days after Shepard's death.

Four major points emerged from the community-wide debate and discussion: The media were intrusive; they projected an unsubstantiated and unfair portrait of Wyoming as a "hate state"; they relentlessly linked Shepard's murder to the fact that Wyoming had no hate crime law; and they overtly promoted hate crime legislation as a necessary response to the death.

## The "Hate State" Story

The national media's "hate state" narrative began in earnest three days after the attack on Shepard and two days before his death, with an October 10 dispatch by the Associated Press' E.M. Smith: "Alicia Alexander thinks she knows why a gay classmate at the University of Wyoming who begged for his life was savagely beaten and left tied to a wooden ranch fence to die in the cold. 'That has to do with the fact that this is a cowboy place. People aren't exposed to it [homosexuality]. They're too close-minded.'"

That same day, *The NBC Nightly News With Tom Brokaw* ran its segment outside Wild Willies Cowboy Bar complete with a patron saying, "Gays get what they deserve."

According to Tiffany Edwards, the *Boomerang* reporter who wrote a detailed report of local residents' reactions to national media coverage of the Shepard homicide, NBC's Roger O'Neil interviewed a variety of bar employees and patrons but selected only the "negative" comments. Such pointed use of interviews and quotes by the television networks was a common complaint at the "Hostility Bites" forum. Matt Galloway, a student who spoke at the forum, had been interviewed by ABC's *20/20* because he had attended high school with Shepard and was a bartender at The Fireside Lounge when Shepard met his alleged murderers there. "The national media," Galloway explained, "will get 100 interviews and, if they get one like 'gays get what they deserve,' they will use it."

The "gays get what they deserve" quote caused a local uproar, thoroughly covered by reporter Edwards and discussed in letters to the editor. Witnesses to the NBC interview in Wild Willies dispute its interpretation of the bar patron's somewhat inarticulate and rambling comments. "Honestly," one witness, a bar employee, said, "the customer, although not eloquently stated, was taken out of context. His opinion was that in any state, any town...open gayness is a very touchy subject."

A co-manager of the bar even confronted O'Neil while he was still on assignment in Laramie. As reported in the *Boomerang*, O'Neil explained that not only had he not conducted the interview himself, he had not actually seen or heard the footage. Instead, he was "briefed" on it by his producers who had already transmitted the video segment to NBC's studio in Burbank, California, for editing. According to the co-manager's account, O'Neil admitted that he based his lead-in to the story on what he had been told at the briefing. Faced with a possible misinterpretation, the newsman allegedly became defensive. According to the co-manager, O'Neil "said 'I won't waste my time trying to clean up this town's mess...for five years in a row hate crime legislation has been declined by the state. I don't think Wyoming deserves a positive picture.'" In an interview for this story, O'Neil did not deny making those statements, but explained that the controversial comment by the bar patron was selected over the other interviews because it was "higher quality" on technical grounds (i.e., had better sound, lighting, and the like) than the other interviews.

## Media Trend-Spotting

Reporters' explicit linkage between the killing and the need for legislation immediately transformed Shepard's murder from a routine crime rarely reported beyond a particular community to an emblem of a national trend. The hate crime news formula turns a murder into a marker—and a market—for a broader, more important, and more dramatic issue that is typically cast in the most black-and-white moral terms possible. Hence, the day after Shepard's death James Brooke reported in *The New York Times* that it had "fanned outrage and debate" throughout the nation. "Gay leaders hope Mr. Shepard's death will galvanize Congress and state legislatures to pass hate-crime legislation to broaden existing laws," continued the piece, which included a supporting quote from Elizabeth Birch, executive director of the Human Rights Campaign, a Washington-based gay lobby organization. "There is incredible symbolism about being tied to a fence," said the National Lesbian and Gay Task Force's Rebecca Isaacs, referring to the details of Shepard's murder. "People have likened it to a scarecrow. But it sounded more like a crucifixion."

**Pointed use of interviews and quotes by the television networks was a common complaint. "The national media," one resident explained, "will get 100 interviews and, if they get one like 'gays get what they deserve,' they will use it."**

Brooke's front-page story included a reference to conservatives, "particularly Christian conservatives" who "generally oppose such [hate crime] laws, saying they extend to minorities special rights." Steven Schwalm of the right-wing Family Research Council said hate crimes laws have nothing to do with perpetrators of violent crime and "everything to do with silencing

political opposition" and that such laws "would criminalize pro-family beliefs." Rigidly dualistic, the hate crime news formula simply does not accommodate less polarized or more moderate views, such as those from openly gay authors and activists such as Richard E. Sincere Jr., Paul Varnell, Jonathan Rauch, Andrew Sullivan, and others associated with the Independent Gay Forum, which advocates elimination of government-sponsored discrimination against gays while opposing "liberationist" political strategies rooted in identity politics. In the hate crime formula, you are on one side or the other of all the issues. There is no sense, for instance, that a person might be gay, oppose the Christian right, and criticize preferential legal treatment for homosexuals.

The media's methods both reflect and reinforce those of advocacy groups, who similarly cast certain crimes as broadly representative. Less than a month after Shepard's death, for instance, the NLGTF mailed at least two appeals for money drawing heavily on his memory. One appeal sought money for a group in Fort Collins, Colorado, that was promoting a city anti-discrimination measure that would include sexual orientation. A second mailing sought money for the NLGTF itself.

Other gay groups, in places such as Los Angeles and Michigan, followed suit. Like the mainstream national media, they implicitly linked the murder both to a lack of hate crime laws and to a Neanderthal Wyoming culture. "Your donation becomes our tool, our weapon," one appeal read, "against ignorance and intolerance, the forces which killed Matthew Shepard." In an interview with *The Advocate*, the nation's biggest gay publication, Dianne Hardy-Garcia of the Lesbian/Gay Rights Lobby of Texas approved of these efforts, particularly if the money is earmarked for the passage of hate crime legislation. She said there is "nothing more basic" than the need to pass hate crime bills. "We need to be frank with the [gay] community that we need more resources."

At least one aspect of the gay community's "outrage and debate" failed to interest the national media: The same *Advocate* story that quoted Hardy-Garcia cited a number of activists, most speaking anonymously, who condemned the use of Shepard's name so soon after his death. Some did go on the record: Terri Ford, a member of a Los Angeles–based political action group formed in reaction to Shepard's murder, said the NLGTF money raising efforts were "disgusting." A spokesperson for the NLGTF defended the fund raising efforts by saying, "We have often used tragedy to teach, and we will continue to do so."

## A Socially Constructed Epidemic

The lessons that the NLGTF, along with other advocacy groups and national media sources, want the Shepard case to teach are clearly drawn: There is an "epidemic" of anti-gay crime in America, particularly in unsophisticated backwaters such as Wyoming; hate crime legislation is the only remedy; opponents of such laws are themselves allied with the forces of darkness.

Those are, at best, debatable notions; at worst, clear misrepresentations. In *Hate Crimes: Criminal Law & Identity Politics* (1998), legal scholars James B. Jacobs and Kimberly Potter analyze what they call the "social construction of a national hate crimes epidemic." Contrary to media and advocacy-group pronouncements, Jacobs and Potter found no substantiation of a hate crime "epidemic" against gays or any other group, "despite a consensus to the contrary among journalists, politicians, and academics." Their own analysis concluded that "in contemporary American society there is less prejudice-motivated violence against minority groups than in many earlier periods of American history." Violence against minorities "is not new and is not on the rise." They point to other "epidemics inflated by those committed to mobilizing public reaction," such as child kidnapping, drunk driving, and homelessness. The "uncritical acceptance" of the "socially constructed epidemic" is potentially damaging, argue Jacobs and Potter. "This pessimistic and alarmist portrayal of a fractured warring community is likely to exacerbate societal divisions and contribute to a

**Epidemic or Isolated Outbreak?: Legal scholars James B. Jacobs and Kimberly Potter document there "is less prejudice-motivated violence" today "than in many earlier periods." (Pictured: Anti-gay protestors at Matthew Shepard's funeral.)**

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self-fulfilling prophesy. It distorts the discourse about crime in America, turning a social problem that used to unite Americans into one that divides us."

While one would expect this relatively good news to be heralded as evidence of social gains and a greater tolerance for alternative lifestyles, the authors uncovered a very different dynamic at work. Lack of evidence hardly deters promoters of hate crime legislation. Indeed, even when the NLGTF's own 1993 survey reflected a 14 percent decrease in hate crimes against gays and lesbians from previous surveys in six major cities, a spokesperson announced, "All the anecdotal evidence tells us this is still an out-of-control problem." Using the survey as her supporting evidence, an NLGTF representative told a congressional committee that "anti-gay violence clearly remains at epidemic proportions." Another NLGTF spokesperson characterized the study as proving that the gay community was "under siege—fighting an epidemic of violence."

Jacobs and Potter contend that in a political environment dominated by identity politics, advocacy groups seek "to call attention to their members' victimization, subordinate status, and need for special governmental assistance...[They] have good reasons for claiming that we are in the throes of an epidemic... [Such] demands [require] attention, remedial actions, resources, and reparations. The...media also have an incentive....Crime sells; so does racism, sexism, and homophobia. Garden variety crime has become mundane. The law and order drama has to be revitalized if it is to command attention."

Given these forces, the "epidemic" theory has been widely accepted, even with no solid evidence or, indeed, evidence to the contrary. The formula is designed so that it can only be verified, never refuted. Such predispositions made it almost inevitable that the murder of Matthew Shepard—who was, by all accounts, singled out partly because of his sexual orientation—would be discussed in terms of the "hate crime epidemic" and the "urgent" need for hate crime laws. (That Shepard died just as pre-planned National Coming Out Day activities were beginning provided another ready news hook.)

## Political Placebos

In addition to the question of whether a hate crime epidemic actually exists is the issue of whether hate crime legislation would do anything about the situation. While the media uncritically articulated such an assumption, it's no more proven than the existence of the epidemic in the first place. In a *New York Times* op-ed piece, Jacobs said he was certain that the alleged perpetrators in Wyoming, like those who a few months before had murdered James Byrd in Jasper, Texas, were not "invited to their crimes" because of their states' criminal codes. In fact, all face capital murder charges and the death penalty (which has already been ordered against the first defendant in the Byrd case). "Yet well-meaning and misguided politicians and gay activists say the tragedy demonstrates a need for more state and federal 'hate crime' laws," he wrote. "It is hard to see the current outcry as anything more than another chance for politicians to go out on a limb and declare themselves against hate and prejudice."

One could argue that hate crime laws have far more pernicious effects than simply allowing politicians to display false courage. Andrew Sullivan in *Virtually Normal* (1995) contends that hate crime laws are not only generally ineffective, they function as political decoys or placebos, actually maintaining the status quo of gay inequality. Fundamental, government-enforced discrimination against gays—including prohibitions against military service and same-sex marriage—is obscured by such laws, he argues.

**Journalists ominously reported that "Wyoming has no gay bars," a fact that becomes less compelling when one realizes that the state has no decent shopping malls, either: The paucity of both reflects economic realities, not political or cultural judgments.**

Drawing a page from some death penalty advocates, supporters of hate crime laws typically contend that such legislation, whether or not it affects crime, sends the "message" that society won't stand for certain types of behavior. But individuals interpret messages differently; often they do so in ways unintended by the sender. While to some a hate crime law is a marker of a tolerant, enlightened community, to others it establishes grotesque hierarchies of victims. Such a move is inherently divisive, as it implicitly places more value on some lives; it also provides ammunition to anti-gay activists who accuse gays of seeking "special rights."

Such concerns were clearly at work in Wyoming residents' outrage regarding the disparity between the coverage of Matthew Shepard's murders and similarly ugly crimes. They were in no way rationalizing or minimizing Shepard's murder. Rather, they were expressing discomfort with the idea that one life is inherently more valuable than another. In fact, after Shepard's death, when the Laramie City Council was considering a hate crime ordinance, the mother of the 8-year-old girl who had been murdered earlier in the year opposed it, claiming it would create an "emotional split" among relatives of crime victims.

## What? No Gay Bars?

With its lack of interest in local knowledge, the national media misinterpreted such reactions as further evidence of regional homophobia, a conclusion perhaps buttressed by the superficial sameness of Wyoming's population: According to official census numbers, it's 92 percent white, 5.7 percent Hispanic, less than 1 percent each African American, Asian American, and

Native American. Journalists ominously reported that "Wyoming has no gay bars," a fact that becomes less compelling when one realizes that the state has no decent shopping malls, either: The paucity of both reflects economic realities, not political or cultural judgments.

If anything, a live-and-let-live culture has emerged from "high altitudes and low multitudes," to quote Wyoming politicians' favorite cliché. For instance, gays and straights alike frequent The Fireside Inn, the bar at which Shepard met his alleged killers. For a small population (453,388 in 1990, lower than any other state's) that occupies a space larger than the United Kingdom and averages fewer than five persons per square mile, the distances are too great, the people too few and interdependent, the economy too underdeveloped, and the sense of community too strong to accommodate the separatism that identity politics demands. In such a land of pragmatic tolerance, distinctions like that always will be unpopular.

That is particularly true when such distinctions are created and enforced by the government. Skepticism and resentment about government is widespread in a state in which 45 percent of open space is still owned by the feds and managed—arbitrarily, it is frequently charged—by bureaucrats in Washington, D.C. Dissatisfaction with land use policies is one reason why Wyoming has for years been an enthusiastic participant in the "sagebrush rebellion," the populist intermountain state initiative to curb the Bureau of Land Management's power over public lands within their states.

But skepticism about government does not equal intolerance, as Wyoming's trail-blazing history on women's rights and other social issues suggests. If anything, it equals an embrace of quirky individualism. Wyoming's quintessential and highly popular politician is former Republican Sen. Alan Simpson, who wrote in his 1997 autobiography, *Right in the Old Gazoo*, "I have flunked damn near every litmus test that was ever administered in politics. I am a conservative—but not as far as the Christian Coalition is concerned, because I am pro-choice [and gay friendly]. I think of myself as an environmentalist, because I worked hard on conservation issues. And yet I am a true believer in the multiple use of the public lands, something the real tree huggers will never support."

In 1998, the Wyoming Republican Party—which dominates the state politically—put out a 50-point platform that contained none of the usual Christian Coalition boilerplate anti-gay initiatives inserted in many state GOP platforms. In fact, only one of the party's 79 less-important resolutions commented on homosexuality, affirming that gays, lesbians, "and those engaged in alternate lifestyles have the basic rights and protections of American citizens...but...no special rights or privileges [should] be granted to them."

While the rhetoric about "special rights" is vintage Christian Coalition, it is buried in a cluttered menu of mostly trivial resolutions, a faint echo of the usual fire-and-brimstone fare. That is as about intolerant as even Republicans get in Wyoming.

## The Road from Laramie

So what does Wyoming's live-and-let-live culture actually look like? On the last day of my December visit, I drove 40 miles west to Cheyenne to meet and interview Jim Corrigan, an officer of the United Gays and Lesbians of Wyoming. According to its Web site, the group formed in 1997 because gays "were sick of having nothing to do other than go down to Colorado for a little fun." It now hosts an annual August "rendezvous" in the Laramie Mountain range that attracts more than 300 mostly gay campers from throughout the region. It also has a Thanksgiving pot-luck dinner and a major winter casino event called "Lovers and Gamblers."

I arrived early at Corrigan's house in a pleasant northwest Cheyenne neighborhood, across the street from an elementary school where my mother had taught in the 1950s. Jeff Lowe, Corrigan's lover, greeted me at the door. He apologized on behalf of Corrigan, who was working late. Jeff said he would try to answer my questions.

As he played a video game with one of his three children, we traded coming-out stories that reflected similar complex experiences of denial, marriage, children, "coming to terms," and divorce. He told me the divorce court granted him custody of his children. After he met Corrigan, Jeff said, they bought the house to settle down and raise the children in Cheyenne. I asked him how neighbors, school officials, and people in general were treating him and his family.

"I love this town and this state and I'm happy being openly gay," he said. "I wouldn't live anywhere else. It's my home. I went to school here. The neighbor kids sleep over here and our kids sleep over there. There are no problems."

I asked him if Wyoming needed a hate crime law. He said the whole world knew the answer to that question, because reporters "from New York to New Zealand" had interviewed him and Corrigan. Corrigan's quotes on the topic had been widely circulated. Later, in a telephone conversation, Corrigan told me that he strongly advocated a hate crime law "because every nation writes laws to reflect their values and Wyoming needs to have the value of tolerance written into law." Jeff is less enthusiastic about that solution; his quotes on the subject didn't seem to make it into the papers.

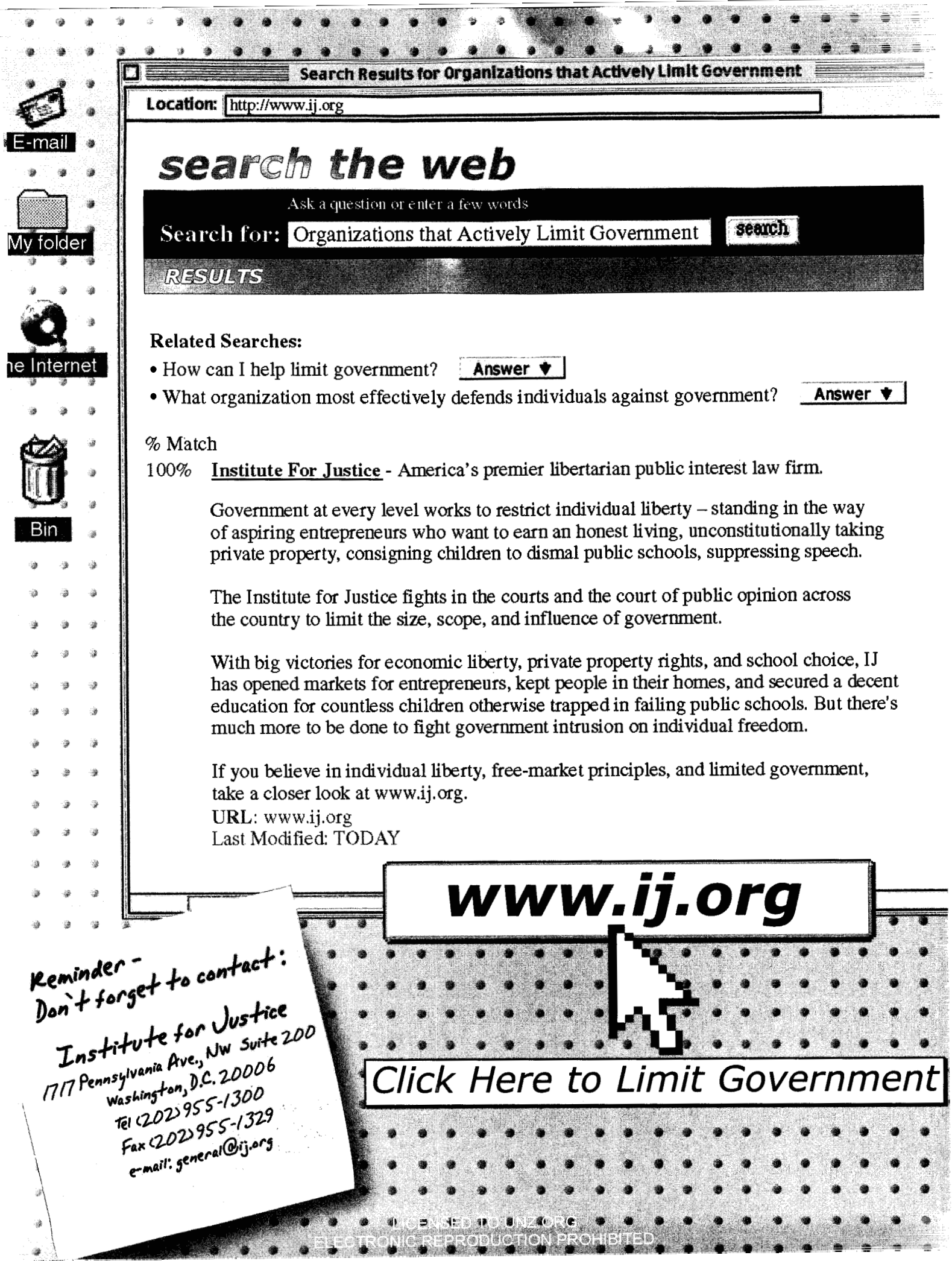
"Did the reporters ask you about your neighbors and how life is in Wyoming?" I asked.

"Yes, they did. As far as we can tell, the press didn't use any of that. You never know what they'll use." Jeff shrugged.

When I asked Corrigan the same question, he agreed and added: "We resent the way the reporters came into this state with their minds already made up. If we didn't give them the right answers, they just ignored us. Their questions were always like, 'Don't you feel unsafe here?' and we'd tell them no, that we were very happy here."

One might have thought that such reactions would have made it into stories about what it means to be gay in Wyoming. But of course, given the hate crime news formula, those comments can only be found buried in reporters' notebooks and on cutting room floors in Burbank and Manhattan. ◆

*Robert O. Blanchard (Robokieb@flash.net) is professor emeritus of communication at San Antonio's Trinity University and vice president of the Texas Log Cabin Republicans.*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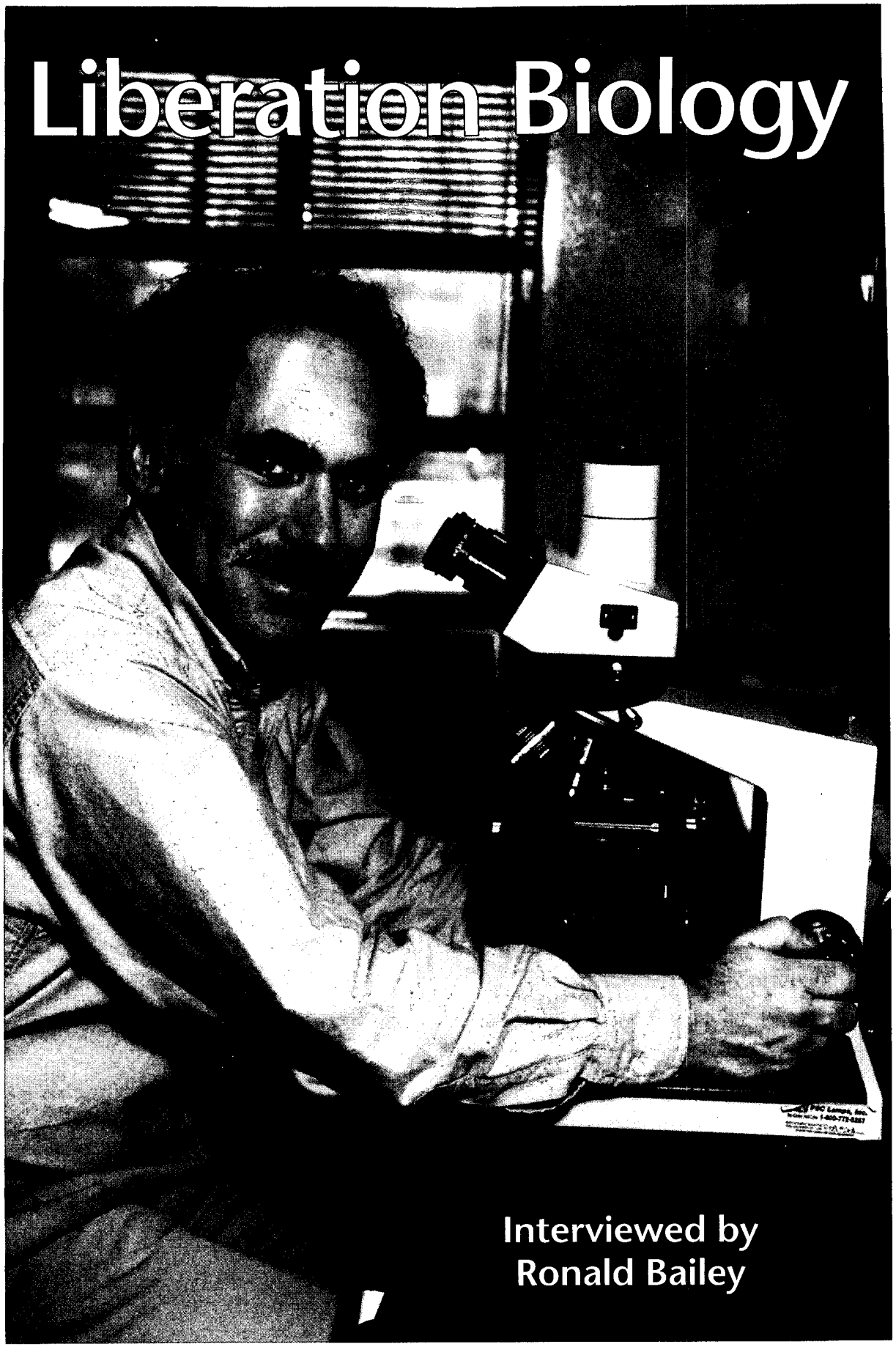
# Liberation Biology



Interviewed by Ronald Bailey

PHOTOS: DENISE APPLEWHITE

## Scientist Lee M. Silver on cloning wars, bioethical battles, and new and improved genes.

Molecular biologist Lee M. Silver is a happy—and increasingly prominent—warrior in the ongoing battles against bio-Luddites on both the left and the right. His thought-provoking 1997 book, *Remaking Eden: Cloning and Beyond in a Brave New World* (Avon Books), thrillingly explores how cloning, combined with other fast-developing biotechnologies, will soon revolutionize medicine and human reproduction.

Born in 1952, Silver started out as a physics major at the University of Pennsylvania. As a senior, he concluded that "even though I loved studying relativity and cosmology, I was never going to be able to go beyond what had been done by Einstein and others." After an all-night discussion with a friend who was a biology major, Silver changed course. "He told me about DNA and RNA and proteins and all about molecular biology," recalls Silver. "And I said, 'This is great. This is what I want to do.'" He got his Ph.D. in biophysics from Harvard and went on to a post-doctoral fellowship at Manhattan's Sloan-Kettering Institute to learn about the biology and genetics of mice. Then came four years as an independent investigator at Long Island's Cold Spring Harbor Laboratory, which is run by Nobelist James Watson, one of the co-discoverers of the double helix structure of DNA.

Arriving at Princeton University in 1984 as a professor in the Departments of Molecular Biology and Ecology and Evolutionary Biology and the Program in Neuroscience, Silver has recently shifted his focus to behavioral genetics. "To my mind," he says, "we basically understand pretty much everything about the basic principles of biology except for how the mind works." Silver is now studying how genes affect behaviors such as alcoholism, aggression, sexuality, and curiosity in mice. He points out that "almost every single gene present in mice is also present in humans. So if you find a gene in mice that clearly affects what psychologists call novelty seeking, you can go see if it does the same thing in humans."

When Silver is asked if he thinks he may be afflicted with the novelty-seeking gene, he replies with a laugh: "I am definitely afflicted with novelty seeking. Absolutely. Absolutely. I can't stay still—I will jump from one thing to the next."

Silver's tendency to jump from one thing to the next is not a quality appreciated by some of his scientific colleagues. "There is a conflict going on between the faculty in my department and me," he admits. "My literary agent says I have been *Saganized* because I am popularizing science," he says, referring to the late planetary scientist and public television star Carl Sagan. "I think [my co-workers] are sort of angry at me for spending time with something that they think is not worth spending time on, which is going out in the world and talking, as opposed to sitting at the bench doing science." One result of his going out in the world: Later this year, Silver will become a half-time professor at Princeton's Woodrow Wilson School of Public and International Affairs.

REASON Science Correspondent Ronald Bailey interviewed Silver in his office in February.

**Reason:** What do you think is the most exciting development in biotechnology?

**Lee M. Silver:** The most exciting development is that we now have genetic descriptions of lots of organisms, including humans. We are going to have a whole catalog of all human genes very soon. It has already been done for some 15 different microorganisms, and it is going to be done for lots of different animals useful to biotechnology research. This is going to provide a phenomenal database that is going to allow pharmaceutical companies to be able to develop a new field, "pharmaco-genetics." Pharmaco-genetics will use genetics as a way to distinguish subsets of disease so that we can tailor cures based on the particular genes that

individual patients carry. The problem that drug companies have right now is that they have therapies that work in some people and not in others. Researchers are all convinced that the difference in effectiveness is a genetic difference.

Biotech is also going to revolutionize agriculture and energy production—in 100 years, it will be possible to create oil. We are going to create microorganisms that will make long-chain hydrocarbons. We will have huge power over simple living systems, and even complex systems like animals. We will be able to create any substance we want using microorganisms or animals. Once you have genetically engineered an animal, you have essentially created a biodegradable factory. Even its wastes are biodegradable. It's a reproducing factory. Startup costs are huge, but upkeep costs are very, very cheap. That is the future of biotechnology.

**"Biotech is also going to revolutionize agriculture and energy production—in 100 years, it will be possible to create oil. That is the future of biotechnology. In 50 years, all the old factories for making drugs will be shut down and all drugs will be made in cow's milk."**

I bet that in 50 years, all the old factories for making drugs will be shut down and all drugs will be made in cow's milk. You will have a herd of cows making human insulin, human growth hormone, etc. Each herd of genetically engineered cows will make a particular drug in their milk. Consequently, the price per therapy will drop some 100-fold. After all, what does a gallon of milk cost—$2? A genetically engineered cow will produce an amount of drug in each gallon which costs thousands and thousands and thousands of dollars to produce today. So competition kicks in, and all drugs come down in price. I think that is going to begin to happen in 10 years.

**Reason:** Biologists at Johns Hopkins University and the University of Wisconsin supported by the biotech company Geron recently announced that they had isolated and were now growing human stem cells from embryos and fetal tissue. Stem cells are the precursor cells that are capable of being turned into any tissue. Where do you see this technology going?

**Silver:** Stem cells are very exciting, and, again, I think that we will also be seeing some of the benefits of stem cells in 10 years. Creating bone marrow is one of the easier things to do with stem cells, but I don't think we are going to be able to create whole organs from stem cells in 10 years. However, one of the things I think we will be able to do over a much longer period is to create animals that have been engineered so that their organs can be used for transplantation into humans without being rejected.

**Reason:** Last year we heard reports from Korean researchers that they had cloned a human embryo as part of stem-cell research. What do you think was going on there?

**Silver:** All previous instances of advances in cloning technology have come from biotech companies or from researchers in universities that are interested in using cloning as a biotechnology tool, not a reproductive tool. The biotech industry is just interested in making medical products. On the other hand, fertility clinics have no interest in making medical products. Their whole purpose is to help people have babies. Now the Korean group was a fertility clinic. Fertility clinics don't do research on stem cells. That is not part of their purpose. So if you are a fertility doctor, trying to create a cloned embryo with a woman's egg (and in this case using her own cells), there is no other reason to do this unless your intention is to produce a child. So what I think happened—and this is an honest speculation—is that the embryo didn't look very good and therefore the Korean researchers aborted the experiment. And then, they had this huge outcry, and so I think they devised the stem cell story as a cover.

**Reason:** Why haven't researchers been more successful in using somatic cell gene therapy—replacing defective genes in a patient's tissues with normal versions—to cure genetic diseases such as cystic fibrosis?

**Silver:** Somatic cell gene therapy is very difficult to do. A living person has millions of cells, and you are trying to get a new gene into a reasonable percentage of those cells to fix a disease like cystic fibrosis. Cystic fibrosis patients have a defective gene that keeps them from making a certain protein. So in theory, if you put the good gene into those cells, they *could* make the protein. This would prevent the buildup of fluid in the lungs of cystic fibrosis patients, the most deadly symptom of the disease. In practice, though, it is very, very difficult to get those genes into a large number of cells. This has always been the case.

However, I should say that whenever I have said that something was hard or impossible, I have been shot down by the advance of science. There are a lot of people working with somatic cell gene therapy who are very smart, and maybe they will figure out the magic bullet that will get the DNA into the right cells and make it work. And if it works, it will work overnight. In other words, if you can figure out how to get DNA into a large number of cells in a target tissue, that's it. If you can get over that barrier, then somatic cell therapy will be possible for lots of folks. I don't see it happening right away, but I could be surprised.

Bone marrow gene therapy is the first one that will work. Because you take out the bone marrow from somebody, you add the gene, you find the one cell in a thousand that has picked up the gene. Then you multiply that cell and then put the modified bone marrow cells back in.

**Reason:** What about germ line therapy? Germ line

therapy means introducing a gene into an embryo or egg at an early stage of development so that the gene appears in every cell in an animal or person's body. Is germ line gene therapy more feasible than somatic cell therapy?

**Silver:** Absolutely. Germ line therapy is easy. We have already gotten it to work on lots of different animals. Mice were the first animals in which it was perfected. It has been working on mice now since the 1980s, when the genes for human hemoglobin were put into embryos. Since that time, it has become commonplace and easy to do. My graduate students learn how to do it in their first year. There are tens of thousands of people who can do germ line genetic engineering on animal embryos. And the important thing is that, under the microscope, you can't distinguish a mouse embryo from the human ones. So if you can do it with mice, you can, in principle, do it with humans.

**Reason:** Looking over the horizon, what is the next big thing in biotech?

**Silver:** The DNA chip. The reason the DNA chip is so powerful is that up until now, if you wanted to figure out whether you have the breast cancer gene, or the cystic fibrosis gene, or the gene for sickle cell anemia, we would have to do an assay for each gene. Somebody would take your blood—take your DNA—and look at the relevant gene to see if you had the normal version or the version which predisposed you to a disease. That is what people do now in clinics, assaying one gene at a time. You get a result back 24 hours later. But once all 70,000 human genes are catalogued, a DNA chip will be able to look at all 70,000 of your genes at the same time. And you will get your results back in three hours. You need almost no DNA to do it, just a scraping from your mouth. A DNA chip genetic assay could also be done on an early embryo, giving you a complete profile.

This is going to revolutionize medicine. It is also going to revolutionize our understanding of the connection between genes and who people are. For example, say you are born with a predisposition to a hot temper. This temperament is not the result of a single gene. There is no such thing as a hot-tempered gene. There are probably a multitude of combinations of 30 or 40 different genes that together in certain combinations predispose people to have a hot temper. Using the DNA chip, you can assay 10,000 people to find out the constellation of genes that predisposes you to a hot temper, or predisposes you to being depressed, or predisposes you to any kind of trait. That is phenomenal. Most people right now don't understand the power of this yet. The incredible thing is that this technology already exists. What we need now are the 70,000 genes to put on the chip. We are waiting for the Human Genome Project [which is being coordinated through the National Institutes of Health and the U.S. Department of Energy] to finish; then we can take those 70,000 genes and put them on a DNA chip.

The original version of that project was simply going to catalog all the genes present in human beings—the genome. There are, according to the latest estimates, somewhere between 60,000 and 90,000 genes comprising the human genome. The catalog by itself doesn't do very much—which is where the DNA chips come in. The 70,000 human genes come in different forms. For example, say gene A comes in forms 1, 2, and 3. Using the DNA chip, we can look at people that have form 1; look at people that have form 2; and look at people that have form 3. By looking at the various forms of gene A, we will be able to determine what effects the different forms have on people—how they affect their health and their behavior, etc. That will be the next step of the Human Genome Project.

**Reason:** What do you think about artificial chromosomes? Are we going to have those soon?

**Silver:** Yes. An artificial chromosome will again give you unprecedented power to alter cells. Because right now when we put genes into cells, we are putting in one gene at a time. The artificial chromosome means that you can create what I call "gene packs." You can hook 40 genes on this chromosome. The function of some of the genes will be to shut down natural genes, while others [will] replace natural functions. In the next two or three decades, we are going to be able to build modules of 30, 40, 50, or 100 genes on an artificial chromosome and insert it in the genomes of human embryos and other creatures.

**Reason:** In *Remaking Eden*, you basically come out in favor of human cloning. Would you consider cloning yourself?

**Silver:** I am not interested. I already have my children. Obviously, I have been asked this question many times. I felt the need, probably instinctive, to have children with my wife. And I didn't want to have children that were just for me. I wanted to have children that consummated my relationship with my wife to the greatest extent, and that is why I have my children.

**Reason:** Why do you think there was such a negative reaction when Ian Wilmut of the Roslin Institute in Scotland announced that he had cloned a sheep? Why do most people oppose human cloning?

**Silver:** Let me answer you this way. In the spring of 1998, I gave a lecture to a group of well-educated residents from Princeton, New Jersey, who were not scientists. I began by telling them about the bewildering number of high-tech treatments now available to infertile people. I told them that there were a number of reproductive protocols under consideration, including cloning. But before I discussed cloning in detail, I wanted to get their opinion on another fertility protocol. The protocol under consideration is for cases of severe male infertility, when only the precursors of sperm were present. The proposed treatment entailed the injection of one of the man's testicular nuclei containing all of

its DNA into an egg cell from his wife that had previously had its nucleus removed. Anyway, I go through this whole long thing and I say, you come out with a baby and the baby kind of looks like the father. The baby might even kind of behave like him, but unless you told anybody, nobody would know that it wasn't just a son produced in the normal way between him and his wife. Is his son a clone? And two-thirds of the people said, no, the son is not a clone.

**Reason:** OK. (*Laughter.*)

**Silver:** Which is amazing. Of course, he's a clone. I didn't do an exact count, but I looked at the hands raised and it was about two-thirds. My point is that people—even educated people—still don't know what cloning is. They have the notion that cloning is more than it really is. People think of the word in a context beyond genetics, that somehow there is a soul that has been replicated in some way that goes beyond the genes. And when I explain that the genes are the same but that the human being that develops is not the same as the human being that existed before, the response I get from lots of people is, "Is that all it is?" So I think the word is actually used incorrectly. You are not copying a person. You are having a child born who has all his genetic material from one parent. When biologists talk about cloning, they are talking about just copying genes. Nothing else. But in this culture, the word has a different meaning—copying, replicating, duplicating.

Now all of a sudden, Ian Wilmut says he cloned a sheep. If he had used a different word, I don't think it would have caused the same response. I also think that there are people who are against cloning for religious reasons and who know perfectly well what is going on, but who are willing to take advantage of the confusion to reach a certain political goal.

**Reason:** Who and why?

**Silver:** Oh. I think that it is from a right-to-life perspective. Some people believe that God controls reproduction, and we shouldn't be messing with reproduction, period. And if God doesn't want you to have babies, you shouldn't have babies. And if God decides that you are going to have a baby with a birth defect, well, then that is the way it has to be. This is a religious point of view, and cloning is seen as one more way in which we are interfering with God's will.

**Reason:** Are embryos people?

**Silver:** The confusion people have is with the meaning of the words *life* and *alive.* We use the words in two very different ways, one meaning vegetative life, the other conscious life. To biologists, *life* in a vegetative sense simply means the life of cells. In fact, in this beaker [gestures toward beaker containing a pinkish fluid], there are living human cells. Millions of human cells. They are perfectly alive and they are perfectly human, but they are not conscious. But when you talk about human beings and persons, we are talking about consciousness. The best example of the difference that I know of is what happens when a person is shot with a bullet in the heart—he dies almost instantly. And yet, most of his body is still alive. So the person is dead, even though his body, for the most part, is alive. That is the distinction between vegetative life and conscious life. Human embryos are cells, and they are alive in a vegetative sense, not a conscious sense.

**Reason:** So would you be comfortable with saying something like, "Brains are people and genes are not people?"

**Silver:** Well, it is the mind that comes out of the brain—and that is sort of a subtle distinction. But I think it is an important distinction. The brain gives rise to the mind, and people, I think, are defined by those minds. Now, genes play a role in building the brain. Genes provide the framework for the human mind. The human mind, of course, is a dynamic entity, while its genes are static.

**Reason:** That reminds me of an interesting sentence in *Remaking Eden*: "The human mind is much more than the genes that brought it into existence." What do you mean by that?

**Silver:** From the moment of conception or of cloning—however you might begin—the genes don't change. And so the genes in each individual are completely static and unchanging. The genes provide instructions for building a brain, but the mind which comes out of that brain can respond to the environment. The mind can change continuously. And the mind—the human mind especially—can be aware of itself. Human beings are different than all other animals because human minds can understand that their genes have given them instincts that they can then turn around and not follow. That's pretty amazing. I mean, Richard Dawkins' *The Selfish Gene* makes sense in every animal except human beings.

**Reason:** Because those minds are now able to control their genes?

**Silver:** Oh. Absolutely. That is exactly right. In fact, yes, the evolution of the future is going to be totally different from the evolution of the past. Evolution by natural selection was based on chance combinations of genes and new mutations that provided a benefit to the individuals that carried them. The offspring of those individuals would out-compete other offspring. That is the way evolution has worked in the past. It was totally by chance. The individuals involved had no control over the evolution. Today, we can control our own evolution. We can decide what genes we give to our children. So we are actually taking control—or will take control in the future—over the evolutionary process by picking the genes we want our children to have. And then those children will have children who can pick the genes they want their children to have. Already, that is being done to a limited extent with embryo selection in fertility clinics. Even with selective abortions, you are choosing not to put certain genes in your child. In

choosing to have another pregnancy, you are choosing to have a child without particular genes. So you are controlling evolution there.

**Reason:** What do you think of bioethics and bioethicists in general?

**Silver:** I have been called the anti-bioethicist. And that is unfortunate. In fact, I think I am very ethical. I debate and challenge many of the views [held] by some very prominent bioethicists—Leon Kass, Glenn McGee, Art Caplan, and Thomas Murray, for example. I think I am being completely ethical in my point of view, and I think that the opinions of some prominent bioethicists are silly or misinformed. Now there are some bioethicists, like Ruth Macklin, of whom I happen to have a very high opinion. She is a bioethicist at the Albert Einstein College of Medicine. She is a scholarly bioethicist, not a media bioethicist. My opinion is that very often many bioethicists talk about things they don't understand and they make fools of themselves by doing that.

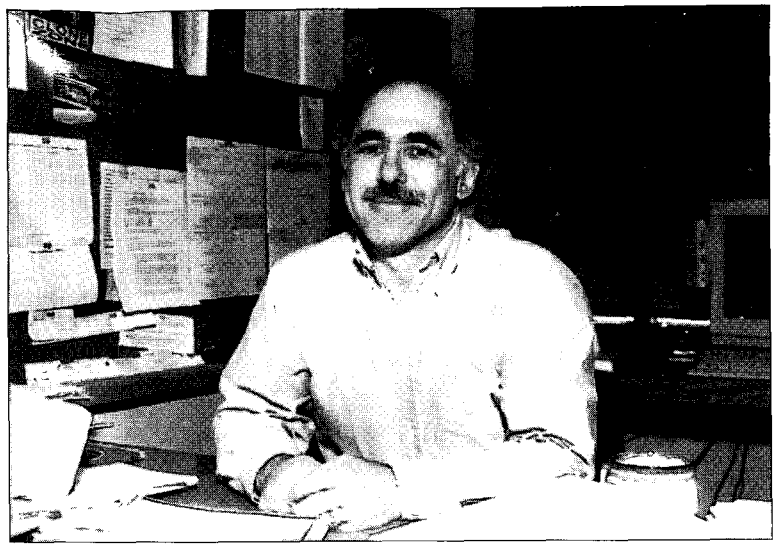
**Reason:** I've been reading a lot about bioethics lately and it struck me that many prominent bioethicists apparently hate biotechnology. Do you get that feeling too?

**Silver:** Of course, of course. Because if they didn't, they would have nothing to argue against. I mean, if you agree with everything, nobody is going to ask you for interviews. They have to be against biotechnology to get attention. I think many also see themselves as playing a role in society as the brake. For some reason they assume that we need brakes. They think their role is making everybody stop and look [at] what is going on before we go anywhere.

**Reason:** Leon Kass of the University of Chicago fears what humanity might do with increased control over our own evolution. He would prefer to put up with the random events of nature than be subject to human whims. How do you respond to Kass' arguments?

**Silver:** I respond by saying that he should have the right not to use this technology when he has his own children, but that he doesn't have the right to tell other parents how they should have their own children. I think that children don't belong to "society," or to the world. Children come out of parents and parents can do what they want with their children—as long as what they are doing is not going to hurt their children, of course. Leon Kass pretends to be a secular bioethicist, but he is not. I believe that his point of view is grounded in religion. Kass has written, "We are repelled by the prospect of human cloning because we intuit and feel immediately and without argument the violation of things that we rightfully hold dear." This is not an ethical argument but a religious one. It is the same one used by the church to persecute Galileo in the 17th century and by current religious leaders who still rally against the teaching of evolution. There is no logic to it. Kass and others are saying, "It is unnatural; we are repelled by it; therefore we shouldn't do it." That is not a valid ethical argument. Kass has written an essay called the "The Wisdom of Repugnance" which is so easy to dismantle. I'm surprised that somebody of his stature can make such a weak argument.

**Reason:** Do you think that religious points of view have no place in the public debates over genetic technologies?



**Silver:** I think that people should be allowed to hold their religious points of view and to practice their own religions. I think people should be able to do what they want with themselves and with their children. I am not against that. I am completely for that. That leads me to say that Leon Kass can believe what he wants about biotechnology. That's fine. He doesn't have to use the technology. But morally, he can't stop other people from using the technology.

**Reason:** What do you think of the argument by Boston University bioethicist George Annas and others that cloning and germ line enhancements are really experimentation on the unborn without their consent?

**Silver:** I think that is total nonsense. A one-cell human embryo is no different than another human cell. Now if you want to turn that one-cell embryo into a human being, it is unethical if the technique has not been proven. I *would* agree that if you don't know what is going to happen, you don't do it. But that is no different than any other medical experimentation protocol. Obviously, you want to test it before you do it in a way that brings forth a child.

**Reason:** So you aren't very concerned about the possibility that cloning and other biotechnologies will be abused?

**"I don't think that children belong to 'society,' or to the world. Children come out of parents and parents can do what they want with their children—as long as what they are doing is not going to hurt their children."**

**Silver:** No. I think that what people are going to want to do is make their children more likely to be happy, more likely to succeed, more likely to be healthy. That is the way I think it will be used. Parents are going to be able to give their children genes that other children get naturally, such as genes that increase athletic ability, genes that increase musical talents—talents are innate—and, ultimately, genes that affect cognitive abilities. Why shouldn't parents be able to give their child something that other children already get? The parents are going to say, "Why can't I do this for my children? I am not hurting my children."

**"I don't have any doubt that these technologies are going to be accepted. If you see a better technology that is beneficial, doesn't hurt anybody, helps you be happier or more successful or healthier—and that is what biotech does—common sense tells you that people are going to accept it and desire it."**

Does that mean that there is no possibility that somebody might misuse the technology? No. We can't say that it will never happen. But I don't think that is an argument to say that nobody should be able to use this technology.

**Reason:** When your children marry and they come to you, their father who is a molecular biologist, and say, "Dad, we are thinking maybe we want to get some of the genetic advantages that you have been talking about for our children," what would you advise your children to do about your grandchildren?

**Silver:** I would ask a technical question first: Has the technology been validated? Is it safe? Assuming that it is going to work, I'd say, "Go ahead. I have no problem with it."

**Reason:** Do you think that will be the common view one day?

**Silver:** I think what is going to happen is what happened with in vitro fertilization. When the first test tube baby was born, people were asked, "Would you use this technology?" Nearly everybody said, "No, I would never do this even if I was infertile; there is no way I would go this far." And then, what happened? A small number of people started using it and they had babies and suddenly, you saw other people have babies and basically, people said, "It can help them; what is wrong with it?" The first response is negative, but I think it will become acceptable in our society. The question is, just how long that will it take? And the answer is that these changes can happen very quickly and society just zooms ahead.

**Reason:** In *Remaking Eden*, you suggest that in the future there will be genetic haves and genetic have-nots. Do you still think that way?

**Silver:** In the paperback edition, I basically backtrack. Evolution—the old-fashioned way, through natural selection—will stop because people will choose which genes to add to their children. Now those new genes will enter the gene pool of the whole human species, which is inextricably connected. If nothing else, the spread of AIDS around the globe has conclusively demonstrated that no human populations are sexually isolated from any other populations. And so, over many, many generations and in the distant future, these genes will spread throughout the gene pool. There is still going to be a question of access. Will genetic technologies be available to only 10 percent of the population? I don't believe it will be that restricted. The top 50 percent? The top 80 percent? Who knows? There are certainly poor countries whose citizens will have less access, but the fact is that the enhanced genes will spread. They will travel around the whole gene pool.

**Reason:** You are hopeful that these technologies will not only be widespread but fully accepted one day?

**Silver:** In the long term, I don't have any doubt that these technologies are going to be accepted. There is a lot of confusion and misunderstanding in the public realm right now, exacerbated by some bioethicists. But there is a basic common sense that seeps into the general population. If you see a better technology that is beneficial, doesn't hurt anybody, helps either you or your children be happier or more successful or healthier — and that is what biotech does—common sense tells you that people are going to accept it and desire it.

**Reason:** George Annas wants to create a federal human experimentation agency that would require biotech proponents to prove that there is an important social purpose for a line of research before they would be allowed to pursue it.

**Silver:** I think he is completely misguided. We already have procedures that we go through in this country to test new medical protocols. It is true that privately funded researchers don't *have* to do this, but almost all of them do it anyway. They have institutional review boards that look at experiments to make sure they are ethical and to make sure informed consent is obtained. I think informed consent is critical. I think that before any prospective parents use genetic therapies on their children, they have to be informed of everything. But I think George Annas is wrong.

**Reason:** You don't see, at this point, any particular reason for more federal laws regulating biotech?

**Silver:** No. That is not to say that I don't think there are certain ethical rules that I hope are followed. But the question is, what is the best way of making sure they are followed? I do not believe in a free-for-all. But my feeling is that very often when we are talking about the federal government, we are talking about some members of Congress who have their own particular goals in mind. Often you end up with something that you didn't start with. So even if somebody initially suggests a very rational rule, by the time it actually gets passed into law, it could be something totally different than what was intended. ◆

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# Truthless.com

## A "Tom Clancy" thriller lends support to the foes of encryption.

By Mike Godwin

If the world were a Tom Clancy novel, I'd know just what to think of *Ruthless.com*, a techno-thriller published late last year that was "created," if not actually written, by the famous author. I'd have to conclude that such a committee-written, book-like product had been designed by nefarious operatives in the corridors of power to bolster our government's current policy of trying to slow the spread of encryption technology—that is, an individual's ability to encode communications and data so securely that no one else, including the government, can read them

From a Clancyworld perspective—a perspective I know well, having maintained a secret Clancy habit during the last 15 years—there's lots of evidence that *Ruthless.com*, nominally based on a computer game of the same name, is more propaganda piece than novel. Take this passage from the back cover copy: "Encryption technology keeps the codes for the world's security and communications systems top secret. The profit potential is huge—but deregulating this state-of-the-art technology for export could put a back-door key in the front pocket of spies and terrorists around the world."

Whoa! It's true that the National Security Agency and the Federal Bureau of Investigation continue to argue that restricting export of encryption products, such as Phil Zimmerman's Pretty Good Privacy software, is necessary to keep terrorists and criminals from thwarting government wiretaps and other surveillance measures.

Let's leave aside for the moment the fact that such an argument is not particularly convincing, relevant, or to the point. The claim that export somehow will lead to *compromised* encryption technology is a new notion—and one that's frequently repeated, yet never explained, throughout *Ruthless.com*.

It's also flatly bogus: Even if it were true that a terrorist with any encryption software product in his hands could figure out a way to install "a back-door key," there's no way he could install it in everybody else's copies of the software. Nor does exporting the product make it any easier to crack it; there's nothing magical about our national borders that makes encryption software weaker or less secure when it's exported. Yet this claim is made several times and presented as if it were obviously true. Repetition of false claims until they're accepted as true: In Clancyworld as in our own, that's a classic propaganda technique.

What makes the anti-encryption propaganda in *Ruthless.com* even more effective is that it's labeled with Tom Clancy's name. Rightly or wrongly, Clancy's long-standing appeal is grounded in the perception that he's technically accurate when describing military hardware and other techno-wizard gimcrackery. When Clancy exploded on the book scene in the 1980s with *The Hunt for Red October*, a thriller about a Soviet nuclear submarine whose captain wants to defect, the book was praised in the highest military and policy circles for the author's grasp both of military technology and of the ways soldiers, spies, and politicians *think* about the technology. President Ronald Reagan even went so far as to declare the book a "perfect yarn."

**_Ruthless.com_, nominally based on a computer game of the same name, is more propaganda piece than novel.**

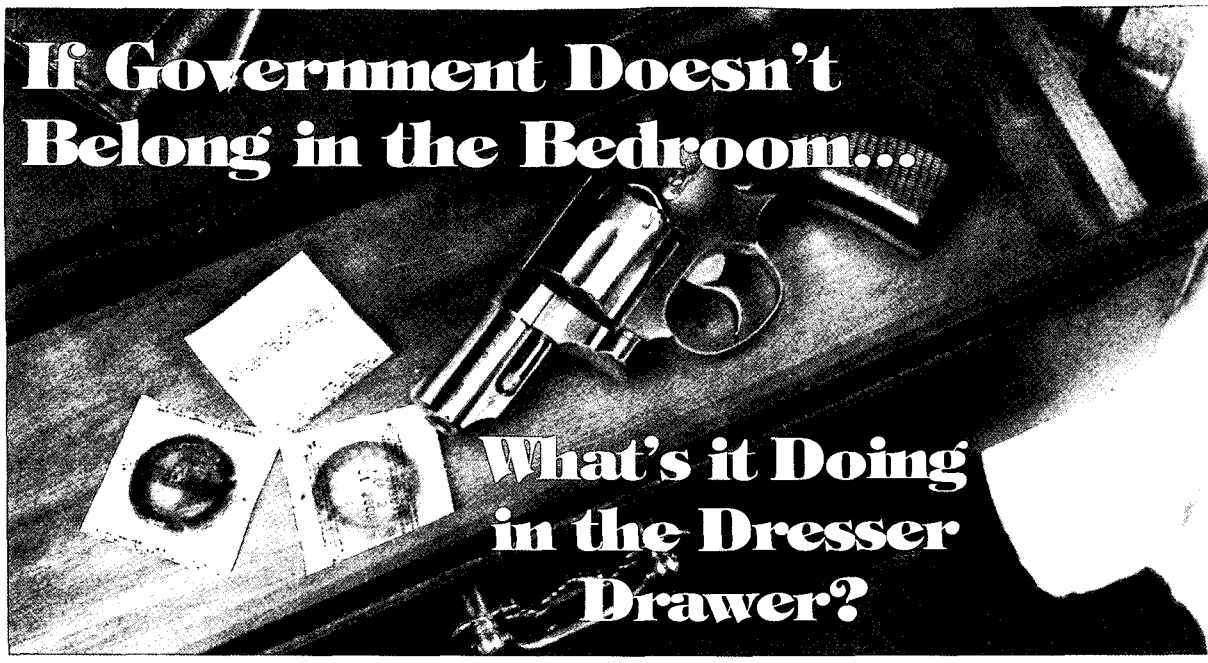
Subsequent Clancy books have shown the same ease with technical and strategic issues—so much so that Clancy's take on those issues is itself considered seriously in some policy circles (as a senator, Dan Quayle famously argued that Clancy's *Red Storm Rising*, which depicts a Soviet-initiated World War III from a technical and strategic perspective, made the case for U.S. development of an "anti-satellite weapons system"). Rumors abound that Clancy, a political conservative who favors increased military spending, has technical sources in high and secret places.

With my own Clancyworld paranoia running at full throttle, I pursued my dark suspicions about *Ruthless.com*. Perhaps, I thought, Clancy's highly placed government connections *asked* him to publish this book to put his imprimatur on an anti-encryption policy that is increasingly being questioned both in the press and by civil liberties groups. Even more suspicious, I thought, was the fact that no one is actually credited as the author of the book—both the cover copy and the interior copy evasively say *Ruthless.com* was "created by Tom Clancy and Martin Greenberg."

Perhaps this book, which reads almost like a parody of Clancy's hammer-it-home literary style, was actually written by someone else. If so, who wrote it? FBI chief Louis Freeh? Some nameless spook at the NSA?

In the best Clancy tradition, I decided to do a little investigating of my own. I began by calling the publicity office at *Ruthless.com*'s publisher, Berkley Books. I told the woman I spoke to that I wanted to interview the author of the book—"whoever it is; I guess I know it's not Mr. Clancy"—about the sources and inspiration for the novel. Seeming a bit flustered, she told me that she couldn't help me then—"it's late in the day," she said—but she'd have a publicist call me the next day. But no publicist ever contacted me, and when I called again a few days later, I was told that the publicist for the book was "unavailable." No clue as to when that situation would change.

So I tried a different tack. I called up the secretary for Robert Gottlieb, a literary agent at William Morris who's thanked in




## MILLIONS OF LAW-ABIDING AMERICANS OWN FIREARMS. If you're not a gunowner yourself, chances are someone you trust is: a neighbor, a co-worker, a friend or a relative.

But in the last few years, you've been asked to believe some very dangerous things about your fellow Americans, just because they own guns for protection and recreation. You've been told they're "bad," and "different;" that they're not like you, and that they are responsible for all sorts of things from crime to accidents to the insane behavior of a few individuals.

Because you've been told to believe those things, millions of Americans like you have had their rights denied or delayed, with the excuse that you are being "protected" from other Americans just like you.

In the last few years, most of the action has come in the form of government regulation or interpretation of laws. These regulations have been enacted against Americans not in the sunshine of democracy, but in the shadow of bureaucracy. There is little or no recourse for your fellow Americans. Gunowners are denied one of the most basic rights: the right to state their case, not just to legislators, but to other Americans.

A dangerous new front has now been opened against all Americans with the intention of several big city mayors to abandon their duties to their citizens to find reasonable and just solutions to crime. Instead, these mayors prefer to rely on contigency-fee crazed lawyers uninterested in rights, justice or common sense.

### *Time after time, statistics by independent researchers have shown that American gunowners are not the problem.*

They do not break the law when they seek the legal means to own a gun. They are not, and have never been, the problem. The research shows just the opposite: in states where citizens are accorded the right to own and carry a firearm for personal protection, crime rates are lower—much lower—than in places that enact strict control of law-abiding Americans—places like Washington, DC, and Chicago.

Common sense tells you that if crime flourishes, if rapes, assaults, robberies and even murder, are higher in places that deny people just like you the means to self-protection and the protection of their homes and families, then, at the very least, American gunowners are not the problem. It is a dangerous experiment to remove freedoms, one by one, in exchange for the broken promise of safety.

It's always been easier to blame people, especially if you isolate them with labels and name-calling, for problems that are obviously larger, more complicated, and sometimes even insoluble, than it is to work together at the same time we respect each other and our differences. It can't make sense to ignore existing laws, and instead pile on more and more, never bothering to use the laws for the benefit of society.

### *If you think gun control isn't people control, think again.*

The history of gun control—beginning with the denial of firearms rights to newly freed African-Americans in the post-Civil War South, to those aimed at immigrants at the turn of the last century—is a dangerous, deceitful, un-American history of people control. If laws can be enacted, if regulations can be implemented, without review or recourse against Americans just like you, what and who comes next?

Your friends, neighbors, relatives and co-workers who own guns just want what you want: the safe and secure lives that Americans declared their right over 200 years ago; lives that are not judged by others merely because they "seem different;" the renewed promise of a government that works for the people and respects their judgement, and a fair and open hearing in the court of public opinion.

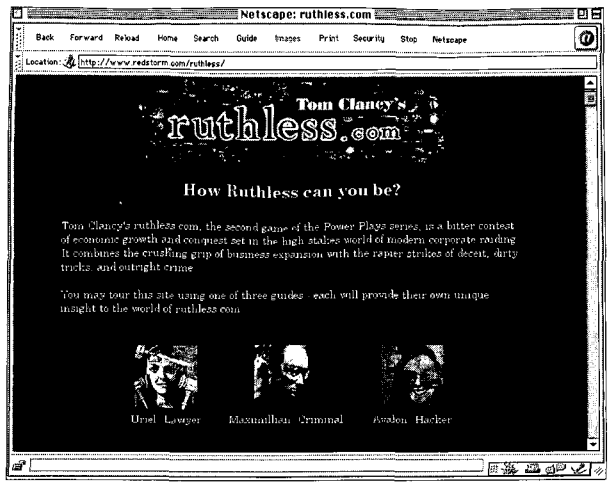
### *The Bill of Rights guarantees your rights—and trusts the people.*

All the rights we enjoy today are dependent on one another. Your rights and liberties, including your privacy and your personal decisions about yourself and family are guaranteed in the Bill of Rights, which includes the Second Amendment.

That's why, for over 25 years, The Second Amendment Foundation has been dedicated to educating and informing all Americans about our precious Second Amendment rights, through books, monographs, periodicals, scholars conferences, grassroots seminars, court cases and public information ads like this.

***To learn more about the Second Amendment Foundation, write us at 12500 NE Tenth Place, Bellevue, WA 98005, or visit our website at WWW.SAF.ORG***

the book's (unsigned) acknowledgments. When I asked her for contact information for "co-creator" Martin Greenberg, I ended up being transferred to Greenberg himself. This was so sudden that it caught me flatfooted, but I was still able to nervously frame a question to Greenberg about the inspiration for the book's encryption theme. Greenberg was even more nervous than I was. He said that, although he's a former political science professor, he wasn't too knowledgeable about technical issues, and that I'd be better off talking to someone at Red Storm Entertainment, the company responsible for the game version of *Ruthless.com*.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Tom Clancy's
ruthless.com
How Ruthless can you be?
Tom Clancy's ruthless.com, the second game of the Power Plays series, is a bitter contest of economic growth and conquest set in the high stakes world of modern corporate trading. It combines the crushing grip of business expansion with the raper strikes of deceit, dirty tricks, and outright crime.
You may tour this site using one of three guides - each will provide their own unique insight to the world of ruthless.com
Uriel Lawyer
Maximilian Criminal
Avalon Hacker

**Clancy's Brand: *Ruthless.com* is not up to the author's usual standards.**

"Don't worry about the technical stuff," I told Greenberg. "I know that well enough. What I really want to talk about is the genesis of the idea for the book."

But Greenberg was afraid to say anything on the record. He explained that he was nervous when it came to talking about the book because he was bound by confidentiality agreements and didn't want to accidentally violate one. "Agreements involving Red Storm Entertainment?" I asked. "Or Clancy?"

"Agreements involving everyone," he said mysteriously.

And with that he referred me to Kevin Perry, a game designer at Red Storm Entertainment, who was a little more forthcoming. Perry emphasized—perhaps a bit too strongly—that there was "no political purpose" to the novel, which had been written at the same time the game was developed. The anti-encryption stance was a function of plot requirements, he said.

That argument is a bit loose, but then so is *Ruthless.com*'s plot: It consists of a disconnected series of Clancyesque scenes, mostly involving a techno-industrialist named Roger Gordian and his arch-rival, Marcus Caine, who's a cross between Bill Gates and Lex Luthor but lacking the brainpower of either. Caine strives to acquire Gordian's company in order to sell Gordian's encryption technology to foreign powers (Gordian, despite his supercapitalist status, refuses to export his crypto products because, uh, this will make them less secure). There's also a kidnapping/murder subplot set in Southeast Asia that doesn't have much to do with advancing the main plot.

Perry, who designed a previous Red Storm game called *Politika* (which also features Gordian and which also led to a Clancy-labeled book), says the anti-crypto-export theme was just a way making Gordian a maverick hero in the Clancy vein. When the book and game were crafted, says Perry, the idea was to anticipate what hot, upcoming issues might "seed" a game and a book that would be a "cross of software, national security, and techno-thrillers." With *Politika*, the seed was the frequent illness of Boris Yeltsin and the political chaos that might follow his sudden death; with *Ruthless.com*, Perry explained, the seed was partly the Microsoft antitrust case (Marcus Caine's company, Monolith, is an operating-system giant) and partly the ongoing debate about encryption policy.

Perry's explanations—especially his disarming admission that the plot's logic is "tortured"—kicked me out of my Clancyworld musings about a plot to use the author's street cred to mislead the American public about encryption policy. Indeed, the sheer opportunism of pegging the book and game on encryption policy because it's likely to be a hot issue does much to explain both the un-Clancy-like looseness of the plot and the equally atypical sloppiness regarding technical details.

There is, for instance, a tacked-on climax that involves terrorists robbing a center where the government stores encryption access codes. Ironically, it's the *soi-disant* anti-terrorist forces in the encryption debate that have been arguing for the creation of such "key escrow" facilities, so that the government can retrieve your key and do a wiretap when it wants to. Yet only if the government's "key escrow" schemes become standard operating procedure will our country and our codes become vulnerable in the way the novel describes them here.

Without disputing that game designers may sometimes facilitate the creation of fictions, that's clearly not the case here. *Ruthless.com*, considered solely as an exercise in fiction writing, comes across just the way you would expect a novel conceived by a team of programmers and hack writers to come across. Where the real Clancy orchestrates the plot elements in his military thrillers down to the finest detail—indeed, that's why he's popular—his emulators in *Ruthless.com* are playing little more than a series of disconnected riffs on the established Clancy themes.

To their credit, though, the *Ruthless.com* team does have it right that encryption policy is a hot issue—and likely to remain one, as governments everywhere grapple with the prospect of losing the ability to snoop into citizens' private communications and data at will. But although the United States has pressured its trading partners over the last decade to suppress powerful private encryption tools, the international momentum is shifting in favor of individual rights.

Even France, which traditionally has denied private citizens the right to encrypt their data, has recently backed down. Still, the long-term success of the pro-encryption movement depends on educating a public that, as yet, is mostly uninformed about encryption policy.

Which is why *Ruthless.com* still bugs me: It would be a shame if the growing pro-encryption policy consensus were undercut just because Tom Clancy lent his name to a bad book. ◆

*Mike Godwin (mnemonic@well.com) is a lawyer with the Electronic Frontier Foundation and the author of* Cyberrights: Defending Free Speech in the Digital Age *(Times Books).*

# Is the Constitution a *Victim* of the Drug War?

| TRADITIONAL RIGHTS | RIGHTS LOST |
|---|---|
| **To search your home, police need a warrant based on reliable information of criminal activity from someone whose information the police can verify.**<br>*U.S. Constitution Fourth Amendment; Aguilar v. Texas, 378 US 108 (1964); Spinelli v. US, 393 US 108 (1964)* | **Police can search your home based on an anonymous tip.**<br>*Illinois v. Gates, 462 US 213 (1983)*<br><br>**Police can ignore fences and "no trespassing signs" and search private property without a warrant.**<br>*Oliver v. US, 466 US 170 (1984)* |
| **The right to be left alone — the most comprehensive of rights, and the right most valued by civilized men.**<br>*Justice Louis Brandels, Olmstead v. US, 277 US 438 (1928)* | |
| **The government cannot deprive a person of property without due process of law.**<br>*US Constitution, Fifth and Fourteenth Amendments* | **Property may be taken from an owner who had no knowledge of its illegal use.**<br>*Bennis v. Michigan, US 116 S. Ct. 994, 134 L.Ed.2d 68, 74-79 (1996)* |
| **"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property . . . "**<br>*Buchanan v. Warley, 245 US 60, 74 (1917)* | **Property can be seized even if the owner is not prosecuted or even acquitted.**<br>*US v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984. US v. Real Property Located at 6625 Zumirez Drive, 845 F. Supp. 725, 733 (1994)* |
| **"The right of the people to be secure in their persons . . . shall not be violated."**<br>*US Constitution, Fourth Amendment* | **Testing bodily fluids for evidence of past drug use is permitted for many government employees, even when there is no suspicion that the employee used drugs or even without suspicion of widespread drug use among employees.**<br>*NTEU v. Von Raab, 489 US 656 (1989) Skinner v. RLEA, 489 US 602 (1989)* |
| **[There is] a tradition and strong resistance of Americans to any military intrusion in civilian affairs. This tradition has deep roots in our history.**<br>*Chief Justice Burger, Laird v. Tatum, 708 US 1, 15-16 (1972)*<br><br>**The use of the military in domestic law enforcement was traditionally a criminal offense.**<br>*The Posse Comitatus Act of 1878, 18 USC 1885* | **Amendments to the Posse Comitatus Act allow the military to serve as police within the United States, giving them the authority to enforce drug laws, operate equipment, conduct joint operations with police, and conduct training exercises. The military was designated by law to be the "lead agency" for interdiction efforts.**<br>*National Defense Authorization Act of 1982, sec. 905; 1989, sec. 1104; 1990 and 1991, sec. 1201; 1991 sec. 1004* |

## The Drug War is Failing to Make us Drug Free. But it May be Making us Unfree!

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# The President in the Attic

## Who is Bill Clinton?

By Charles Paul Freund

In 1999, Washington discovered the politics of the insane. President Bill Clinton, fresh from procedural exoneration in a dismal impeachment trial, was credibly accused of having brutally raped a woman 21 years earlier. Then, nothing happened.

The allegation was made by Juanita Broaddrick, a wealthy Arkansas nursing home operator with no known ties to the president's enemies and no apparent agenda, and was reported in the mainstream press in February in a lengthy op-ed essay in *The Wall Street Journal*, in a front-page news story the next day in *The Washington Post*, and later in a notoriously delayed 30-minute NBC *Dateline* piece that offered independently discovered evidence that tended to confirm her account. But nothing happened.

Among the appalling details of Broaddrick's story was Clinton's use of his teeth in the alleged attack: Her description of his savage biting of her upper lip is described by rape cops as a known M.O.; rapists will use their teeth to terrify and subdue their victims. Broaddrick says that as a result, her lip was swelling badly even before Clinton left the hotel room where, she says, the attack occurred. She attributes to him the exit line that may yet become his rhetorical signature: "You'd better put some ice on that."

If this story is true, it has profoundly disturbing implications about the president's character. Yet the day after this scene appeared in *The Washington Post*, the capital's Sunday talk shows were devoted to the possibility that the president's wife might run for a Senate seat. These programs did take up the rape allegations later, after NBC finally ran its piece. And then nothing happened.

Nothing, at least, that did not indicate the lunacy to which the capital has descended under Clinton. The president declined to address directly charges that he was a brutal criminal; instead, his lawyer, David Kendall, offered a terse denial: "Any allegation that the president assaulted Mrs. Broaddrick more than 20 years ago is absolutely false."

But language and plain meaning have been assaulted repeatedly by Clinton, and Washington actually parsed this statement in search of the smug alibis of logic the president is pleased to allow himself. Let's see, 20 years ago Jimmy Carter was president, so is Clinton really denying that Carter assaulted Mrs. Broaddrick? In 1978, there was no Mrs. Broaddrick; she was then Juanita Hickey, so maybe Clinton isn't denying that he assaulted Mrs. Hickey. And anyway, who knows what advantageous meaning Clinton is assigning to the term *assault*?

So nothing happened, and one essential reason nothing happened is that nothing was scheduled to happen. Washington, its politicians, its interest groups, and most of its journalists, suddenly found themselves the prisoners of procedure. As NOW President Patricia Ireland said repeatedly about the allegations, "There is no forum."

That is, the criminal statute of limitations had long ago expired, so there was no legal forum in which to proceed. The impeachment trial had concluded, so there seemed to be no realistically available constitutional remedy. (Anyway, Democrats had spent months arguing a definition of *high crimes* that would have excluded criminal rape even if it were proved.)

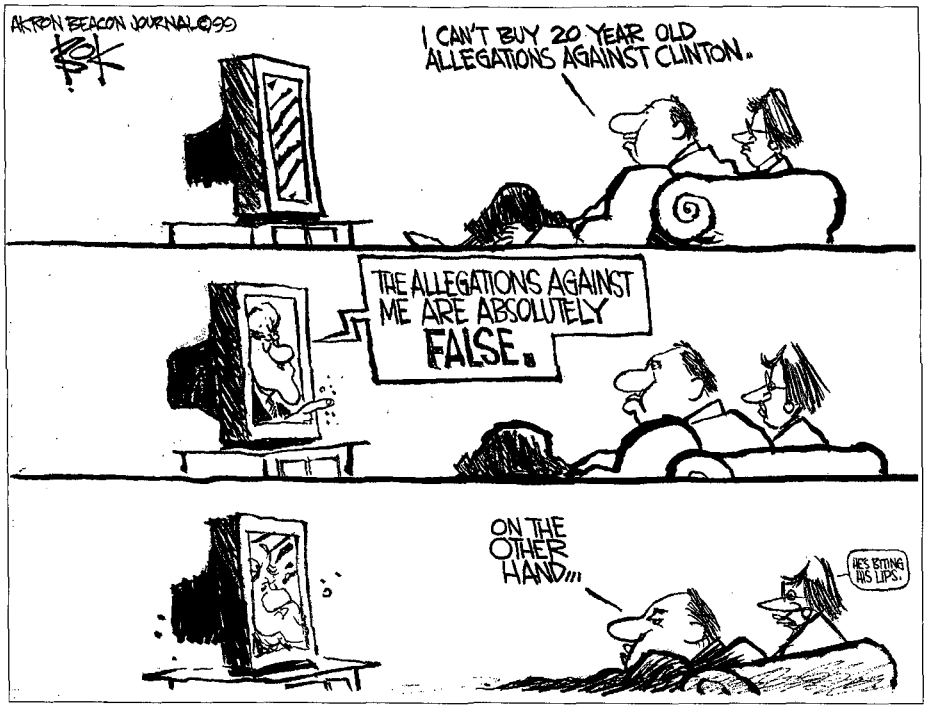
As no official rape-related events were scheduled, the papers apparently concluded they had nothing to write about, so no rape follow-ups appeared in their news pages. The charge was pronounced unprovable, and Washington "moved on."

Indeed, Washington assumed a certain compulsive posture; like a mental patient who can't stop washing his hands, it could only do what it was impelled to do. And what the capital seemed impelled to do was to follow its strictly scheduled routine. Hearings, for example, were scheduled to address mail sweepstakes chicanery, so legislators showed up and righteously denounced such behavior. The press showed up and reported the hearings. But there was no scheduled forum in which to address the assault allegations—never mind their implications—so no one could conceive of a way to address them.

Of course, scrupulous adherence to routine is a well-known strategy of avoidance. The Nobel Prize–winning German novelist Heinrich Böll employed the syndrome as a parable in his powerful portrait of postwar Germany, *Billiards at Half-past Nine*. Böll's main character does everything according to the strictest schedule. To break the routine is to risk thinking; to think is to risk facing the moral implications of a compromised life. Rich though the material may be, no one in Washington is known to be writing *Hearings at Half-past Nine*.

The capital has rarely shown itself to be so unimaginative, or to conceive of itself in so mechanistic a fashion. What usually happens is that once scandalous news breaks, the press, often aided by interested parties who stand to benefit from further coverage, works to produce "second-day" stories and further follow-ups that keep an important narrative going. Indeed, if there is anything "mechanistic" about the capital, it is the so-called scandal machine of press, politicians, and interested outsiders that has so often been triggered in the past.

For example, Republicans (or even a principled Democrat) might reasonably have called on the president to respond more fully to this serious charge. An interest group—say, NOW—might have staged a photographable demonstration in defense of a woman's dignity, as it has been wont to do in other situations involving years-old, unresolvable charges. Someone—a Cabinet member? a women's rights advocate?—might even have asked the president for a meeting to discuss the


AKRON BEACON JOURNAL©99
I CAN'T BUY 20 YEAR OLD ALLEGATIONS AGAINST CLINTON.
THE ALLEGATIONS AGAINST ME ARE ABSOLUTELY FALSE.
ON THE OTHER HAND...
HE'S BITING HIS LIPS.

CHIP BOK

matter.

Reporters might have written about Capitol Hill reactions, or interviewed credentialed rape experts about Broaddrick's account and memory, or tried to ferret out the 40 questions posed by NBC that the president wouldn't answer, or profiled dissident feminists (a Virginia chapter of NOW has long demanded Clinton's resignation; the feminist e-zine *Merge* regularly refers to Clinton as an "asshole"). There were polls to be taken, other public charges of threats and harassment against women to re-examine, possible leads in Arkansas, where the Broaddrick story has been circulating for years—a whole world of unwritten, unreported stories.

Instead, the Broaddrick story moved immediately to the opinion pages, the discussion shows, and Web sites. Opinion is vital to keeping a story going, but it can rarely drive a story on its own. Only news can do that. (That's especially true in an administration as impervious as this one is to mere judgment.) No follow-ups appeared on the major news pages. No major interest groups went beyond an immediate and usually ambiguous press release. And as for the behavior of senators and members of Congress, it approached the indescribable.

Republicans had just launched an effort to push their "positive agenda" and to repair their battered post-impeachment image. They wanted nothing to do with the story. Rep. John Kasich (R-Ohio) told an interviewer that he hadn't paid attention to the charges. Sen. James Jeffords (R-Vt.) asserted on Vermont radio that rape was "a private matter." Democrats, who stood to look like criminal enablers in the wake of their partisan impeachment defense, remained mute. Only Sen. Paul Wellstone (D-Minn.) allowed that perhaps the president should address the charges, and he did so in a subordinate clause.

A single periodical made a concerted effort to squeeze reaction from the Hill. *Human Events*, the right-wing weekly, published an account of senatorial reaction that is a portrait in cowardice. While a few senators thought Broaddrick was "credible," and her story "troubling," none of them could think of anything that could or should happen as a result.

Other responses deserve to be etched in the capital's marble. Sen. Daniel Akaka (D-Hawaii) told the weekly that "I've heard smatterings" about the charges, but "I really haven't paid attention" to them. Sen. Joe Biden (D-Del.) said, "I guess Starr didn't think she was [credible]....I tend to be guided by Starr's judgment." Sen. John Breaux (D-La.) offered only, "I have no comment." Sen. John Chafee (R-R.I.) confessed that "I just haven't paid attention to it. There are certain things I just shut out."

Sen. Peter Fitzgerald (R.-Ill.) said, "I don't see it as anything that is relevant at this moment to my job in the United States Senate." Sen. Charles Schumer (D.-N.Y.) said, "I haven't looked at that....I'm working on Social Security and health care." Sen. Jay Rockefeller (D-W. Va.) said, "I'm beyond that, we've been through that."

Sen. Ted Kennedy (D-Mass.) was asked about Broaddrick's charges while on a Washington escalator. Kennedy "made no verbal response after the question was posed to him directly," according to *Human Events*. "He stared forward impassively until the escalator he was riding carried him beyond the questions of *Human Events*." It is picture of determined avoidance, comic despite the circumstances; disturbing because of them.

Does Washington have something significant to avoid? It may. David Gergen, the *U.S. News* editor who worked for Clinton (as well as for Nixon and Reagan), has termed it the "nausea factor." Brit Hume, who covered Clinton for ABC and is now with the Fox News Channel, has been asking for some time, "What kind of man is the president?" Richard Cohen, the *Washington Post* columnist who long defended Clinton, now wants to know, "Who is this guy?"

The question haunts Washington, though the city's press corps has evolved an ideal of objectivity that appears to stymie any effort to answer it. The way that the press's fairness mechanism operates, somebody has to tell it the answer before it can find a way to print it.

That may in fact be happening. The president's own former associates are, one by one, addressing the question of who Bill Clinton is. Thus far, former press secretary Mike McCurry and former advisers Dick Morris and George Stephanopolous have all questioned the president's fitness and character. While this has led to a momentary debate about "loyalty," the historical record is nonetheless being clarified by the very people who succeeded in obfuscating the journalistic record. Think of it as a kind of talking cure. After all, one Washington community is waiting to do its work after the lawyers and spinners and reporters are done: its historians.

*Charles Paul Freund (cpf@reason.com) is a* REASON *senior editor.*

# April Frauds

## Three manufactured holidays make fools of us all.

By Tama Starr

Expressions of spring silliness aren't limited to April Fool's Day, the traditional prankster's holiday that targets only the willing and the gullible. Three stupid celebrations of more recent vintage make suckers of the whole population.

Earth Day is a designer holiday crafted to dramatize the ascendancy of style over substance, a feel-good feast enabling sentimentalists to live out the ultimate power fantasy: patronizing an entire planet. Nobody has calculated the cost of Earth Day in terms of wasted resources, but during the nearly 30 years since its founding, this foolish fête has surely racked up billions.

Earth Day promises salvation through consumerism: If only we would buy the right stuff—electric cars, herbal remedies, hemp-fiber clothing, biodegradable detergent—the world would be drenched in virtue. It presumes that individual purchasing and packaging decisions trump the effects of volcanoes, earthquakes, tidal waves, tornadoes, ice ages, meteor storms, and solar flares.

Earth Day's hallmark is contempt for the poor, especially the working poor, for whom photo ops are low on the agenda, and for business people and workers in general. Only those who value consumption above production can so disdain the folks who create value.

Two years ago, New York's planet lovers celebrated Earth Day by closing off 10 midtown blocks of Park Avenue, headquarters of some of the country's largest corporations, for the apparent purpose of raising the consciousness of working people by preventing them from getting to work. Bemused office and delivery personnel stood by while green confetti was strewn about and Earth-friendly junk was hawked from kiosks, while politicians with bullhorns proclaimed their love for the Earth and disabled people tried in vain to gain access to their normal transportation. Two million brochures extolling the wonderfulness of Our Planet (printed on recycled paper, which everyone knows costs nothing to produce or clean up) were distributed in the streets and at bridges and tunnels (so that drivers entering the city could pause for a moment after paying their tolls to reflect on the bounty of nature before tossing the brochures out the window).

Soreheads who wondered why the event couldn't be held in a park, where some actual nature was available for contemplation and where Earth Day pollution wouldn't exacerbate the ordinary annoyances of city life, were reviled as planet-hostile. "I think everyone should be willing to give up a day's work to celebrate the Earth," bleated one professional city council member, apparently ignorant of her constituents who live on an hourly wage.

Another year, Earth Day was on a Sunday. My construction company had obtained a special permit for that day to lift a 10-ton steel superstructure onto a building. This work, which requires closing a lane for the operation of the crane, is allowed only on Sundays to minimize traffic disruption.

We'd rented the crane, hired the operating engineers and oilers, and arranged for a triple crew on double time to perform the lift and the welding. Besides these expenses, our contractual penalty for failure to complete on time would be $10,000 a day, or $70,000 a week. No one had told us that the street where we planned to work was among those selected for the privilege of being closed to celebrate the Environment.

At 7 p.m. on the evening before the lift, the traffic coordinator in the mayor's Office of Midtown Enforcement called me at home.

"We're revoking your permit," she said.

"Why?" I asked.

"It was issued in error," she said. "I'm sorry. We thought it had something to do with Earth Day."

I tried to argue. "Are you telling me that if I wanted to lift 10 tons of green balloons saying 'Celebrate Earth Day!' which would get into the rivers and choke the fish, I'd be allowed to do it, but employing two dozen people to lift 10 tons of steel is not OK?"

"That's right."

"I'll hoist the balloons after I'm done with the steel," I offered. "I'll attach the balloons to the steel. I'll lift the balloons, and the balloons can lift the steel. This is ecological. It will utilize the Laws of Nature."

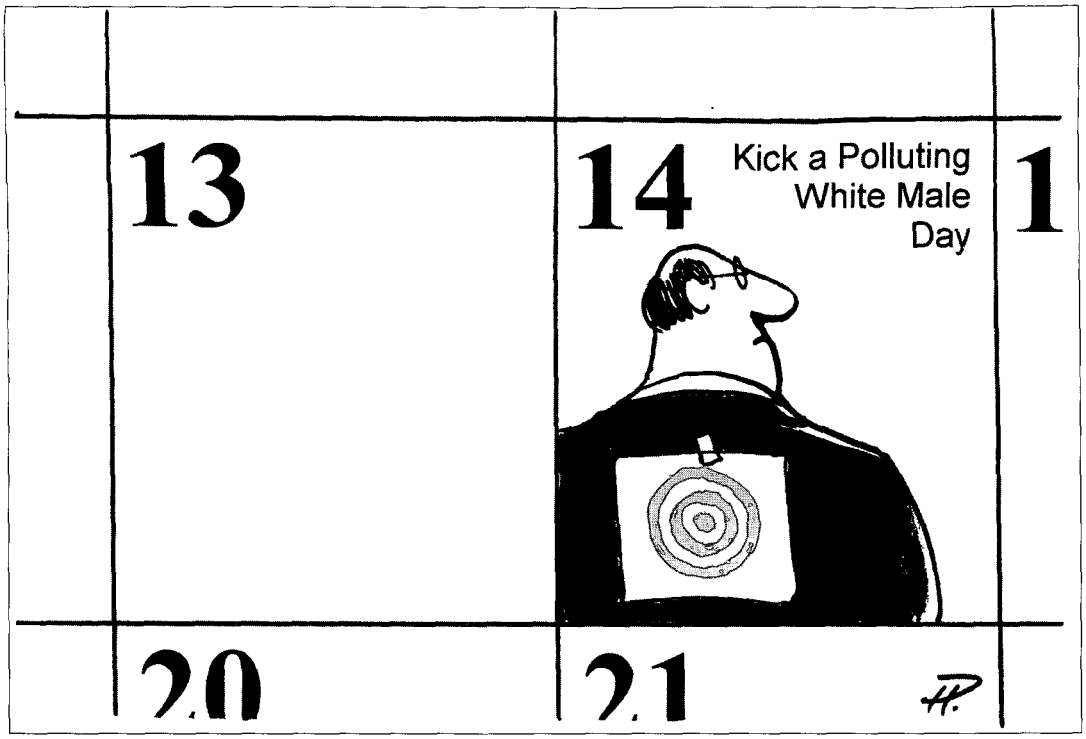
"Forget it."

"I'll paint the crane green!" I was getting desperate. "I'll paint the steel green and write pro-Earth messages on it. Why does it have to be balloons?"

Click.

Earth Day's anti-business bias is not surprising, considering its origins. John McConnell, a self-proclaimed founder of Earth Day (as with other successful institutions, there are rival paternity claims), wrote in his seminal statement of purpose, "Earth Magna Charta": "The long-term goal must be to restructure social institutions so that there is equitable return for services, efficient balance of supply and demand, and fair benefits from our mutual claims to Earth's natural bounty.... One possible way to equitable benefits is for those who own land, oil, gold or other minerals to pay a 2 percent royalty each year on their income from these resources to a fund that will then provide the homeless their inheritance or stake in their planet. All will then join in responsible care of Earth."

For McConnell, who at the age of 85 is still actively promoting Earth Day, the goal is nothing less than the complete reorganization of the world economy: "The digital economy will make it possible to eventually replace money and credit as we know it with new, fair methods of trade and exchange."




HENRY PAYNE

Weirdly coinciding this year with anti-enterprise Earth Day is the seventh annual Take Your Daughter to Work Day, a promotion by *Ms.* magazine, which as a sideline this year helpfully offers $50 "grownup kits" and other paraphernalia to help get you started. This year's inspiring slogan: "The Future Is Me."

Unlike Earth Day, which is merely a crime against working people, this event is a crime against children. It teaches them that it's not what you make of yourself, how hard you work, what you know, or even whom you know that determines your success and professional satisfaction. It's the biological equipment you are born with.

Last year, I entertained a passel of girls whose parents brought them in to introduce them to the mysteries of the workplace. "Where are your brothers today?" I asked them.

"In school!" they chortled. "Only girls get to go to work with their moms and dads on Take Your Daughter to Work Day!"

"Boys have all the advantages," explained a poised 8-year-old, my factory landlord's daughter, calmly collecting my rent check and neatly writing out a receipt. "That's why I get to do this."

This real estate manager's daughter was luckier than many. It turns out that only certain kinds of labor qualify as "work." In 1996 one Michigan mother-daughter team found themselves in trouble when they spent the day doing spring cleaning. School officials balked at giving the teenager credit. "My work at home is my job," said the mother. "I'm taking care of my family. I wanted to show her what work was like at home."

Eventually the school relented. But it's clear that the ritual of spending a day in a parent's or other relative's workplace—a fine idea for both boys and girls—is designed to advance a political rather than an educational agenda.

Secretaries Day®, a promotion by the flower industry, offers (presumably male) bosses the opportunity to proclaim their endorsement of the new, employee-sensitive, "caring and sharing" workplace by bestowing traditional symbols of seduction —flowers, candy, and luncheon or dinner à deux—on female employees.

Something seems amiss here, and not only because the recommended romantic offerings also connote apology. It's as though the boss is acknowledging, one day a year, the underappreciated women who endure his temper tantrums, hangovers, and general boorishness while uncomplainingly performing his work so he can take the credit.

More to the point, changing workplace roles have made it unclear just who is entitled to the posies. Managers tap out their own inter-office memos, administrative assistants mutate into account executives, and information systems personnel and programmers are as likely to be male as female. In my office the men have taken to lampooning this holiday by sending flowers to one another (but not to the women) to avoid giving offense.

A day honoring office workers is a commendable notion. The pros who operate the switchboards, fax machines, and computers, and generally keep the wheels of commerce oiled, deserve recognition. But why not say it with a magazine subscription or a gift certificate from a bookstore, and leave the sexist overtures out of it?

The dates of all three manufactured celebrations are fungible, with different promoters declaring various days to be the "official" one. We should be grateful for the lack of central planning, but the unfortunate result is that all these holidays are exhibiting creepage. Secretaries Day®, formerly the third Wednesday in April, has mutated into Secretaries Week® (April 18–23), and Earth Day, due to some factional conflict between proponents of March 22 and champions of April 22, has been transformed into Earth Month.

Earth Month 2000, according to Earthday.org, McConnell's outfit, will boast 2 billion participants, or nearly a third of the world's population. With any luck, his economic redistribution plan will be well under way by then, enabling all the participants to purchase their allotment of Earth-friendly souvenirs. ◆

*Tama Starr (tstarr@tiac.net) is president of The Artkraft Strauss Sign Corporation in New York City and the author of* Signs and Wonders: The Spectacular Marketing of America *(Doubleday).*

# Firing Squad

## In the gun litigation wars, who really speaks for federalism?

By Walter Olson

The year is 2003, and you finally decide to exercise your American right to own a firearm. You check listings for a store near you ("gun shows," you vaguely recall, were suppressed back in the Clinton administration) and find a few still in business on shabby side streets. The merchandise has tripled in price, the selection is poor, and there's a four-month wait for the model you want. The worst part is that you have to enter all sorts of personal information on a long questionnaire, and the paperwork alone will take weeks to clear—leaving you to wonder who'll have access to your private data once it's in some central digitized registry of gun buyers.

How was it, you wonder, that handgun registration made it through our reputedly Republican Congress? Did some Brady Bill XVII slip by while you weren't looking? The dealer says no: Congress never voted on the new rules one way or the other. They came in as part of the big compromise deal in 2001 settling lawsuits against gun makers—settling some of the lawsuits, at least. Half the makers had already been bankrupted by the litigation, and the rest agreed "voluntarily"—ho ho ho—to what were termed marketing restrictions, aimed at keeping anyone from buying a gun in a state like yours unless they can show they're not planning to transship it to a friend in some place with a stricter gun control law.

Appalled, you complain to your legislators, who reply in chorus: Don't blame us! These suits were carried out under state law, but not *our* state's; in fact none of these legal actions made it past first base in this part of the country. The whole operation from start to finish has been carried out in states where you don't vote, before judges you didn't help pick, by lawyers you don't know, representing mayors of cities where you don't live. Back in the '90s, there was some talk of nationwide action to cut off excessive litigation against product manufacturers. But that idea never got anywhere because critics viewed it as insufficiently respectful of federalism—of the idea that localities should, by and large, be allowed to run their own legal affairs.

What's wrong with this picture? And which side more deserves to wrap itself in the historic mantle of federalism: the trial lawyers who've launched a coordinated nationwide assault on one industry after another, or the gun owners who'd like to preserve at least a local option of firearms freedom?

In recent years, discarding time-honored constraints on their power, state lawmakers and state courts have put forth one unprecedented assertion of authority after another. They've ditched old common law rules so as to charge deep-pocket defendants with harms that were once considered other people's fault, thus making it thinkable to mulct automakers for the costs of drunk drivers' crashes, tobacco companies for the costs of smokers' indulgence in the weed, and now gun makers for the damage caused when their wares are used in crimes. They've discarded old scruples about the unfairness of inflicting such legal changes retroactively, which leaves them willing to punish the 1974 or 1985 behavior of tobacco or gun purveyors because it transgresses legal principles that creative contingency-fee lawyers came up with 15 minutes ago. (See "Retro Style," August 1997.) And—our topic this month—they've also wriggled out of a series of old rules which used to limit the extent to which they could project their power onto the territory of other states. The doings of state courts and state lawmakers, once regarded as a bulwark of local autonomy, have now paradoxically emerged as a threat to genuine federalism.

**In a rational world, attempts to invoke State A's law to ban gun sales in State B would be greeted by the same astonishment as an attempt by Mississippi legislators to regulate the closing hours of Louisiana saloon.**

Here's how the limits worked until not that long ago. Historic rules of jurisdiction provided that courts could hear suits only over persons and businesses that were present on their own territory, while rules governing "choice of law" or "conflict of law" provided, roughly, that they could try defendants only under the law of the place where those defendants had acted. Suppose the mayor of Newark, New Jersey, felt his city legally aggrieved by a Georgia merchant's sale in South Carolina of some items which eventually made their way north as contraband. Under the old jurisdiction rules, as they operated through approximately the 1950s, the mayor would have had to send lawyers down south to sue, rather than conscript the Georgia merchant up to face suit in New Jersey, a state in which he might never have previously set foot. Even if the merchant agreed for some reason to submit to the New Jersey court's jurisdiction, the old choice of law rules provided that his sale would have to be judged in that court under the law of South Carolina, where it had taken place, and not under that of the Garden State.

These geographic constraints on litigation were taken very seriously indeed; in fact, they were accorded constitutional status. Back in the 19th century, the U.S. Supreme Court had declared that the Due Process Clause protected defendants in lawsuits from being subjected either to the jurisdiction of an inappropriate state or to the application of an inappropriate state's law.

Principles like this worked to discourage obscure local courts from entertaining nationally ambitious litigation. Not only was it difficult to corral an entire class of national defendants into a single local court, but complainants could not routinely seek home court advantage—the sort of danger that Alexander Hamilton had in mind in *Federalist* 81 when he predicted that "the prevalency of a local spirit" might be found to "disqualify the local [i.e., state] tribunals for the jurisdiction of national causes."

As the century proceeded, however, the old rules increasingly came under fire from litigation-happy reformers. Weren't the constitutional protections for civil defendants mere historical impediments to the rightful emergence of the state courts and legislatures as vigorous policers of the national economy? With little real resistance, such arguments carried the day. In a series of decisions starting in 1945, the Supreme Court pulled back most of the constitutional protection it had formerly accorded defendants against being dragged to an unfamiliar state to be sued. Rules of "long-arm jurisdiction" quickly proliferated, allowing state courts to reach out and put the touch on distant businesses so long as it was deemed reasonably foreseeable that their actions might lead to their being sued in the state —a standard that is, like an underwear waistband, both elastic and circular.

Suddenly it was possible to try suing more or less anyone, more or less anywhere. Some years previously, the court had relaxed the old due process rules against the application of a distant state's law, and the 1960s saw a proliferation of strained theories allowing distant states to apply their own pro-plaintiff laws.

One result was an enormous rise in "forum shopping"—searching out that one local judge or juror pool most favorable to one's claim or hostile to one's opponent. A wide variety of lawsuits that would be of modest value or none at all in Maine, Iowa, or Oregon can now be taken to certain plaintiff-friendly counties in Alabama, Texas, or Tennessee, where they magically acquire very rich settlement value. The pioneering lawsuit seeking compensation for tobacco-related Medicaid expenses just happened to

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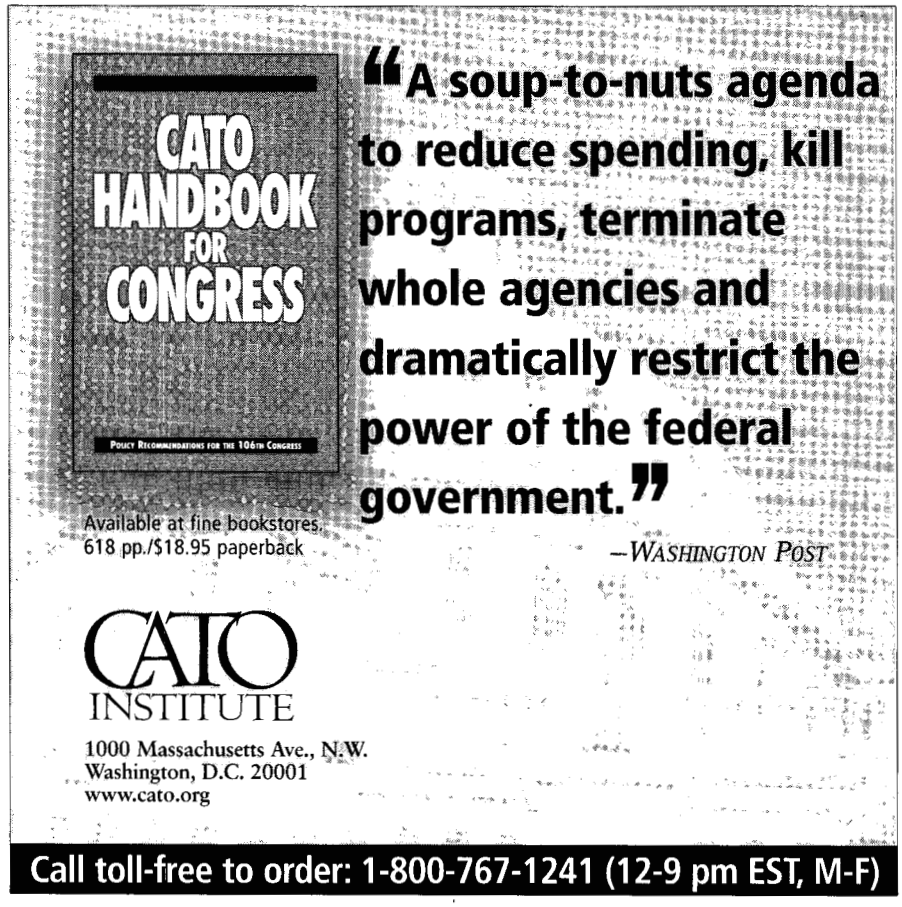
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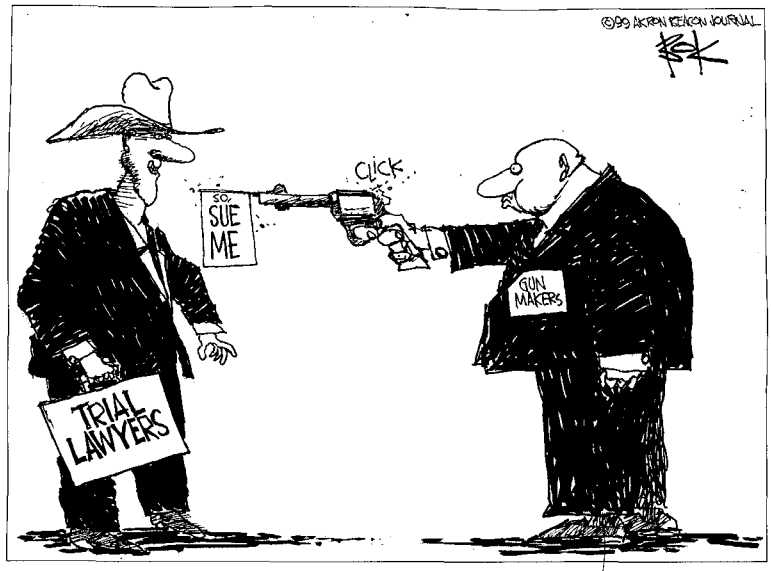
be filed in chancery court in Pascagoula, Mississippi, ensuring what the lawyer filing the case (who is now a jillionaire) called "home cooking."

Once states start perceiving liability law as a way to redistribute money from (mostly) out-of-state defendants to (mostly) in-state plaintiffs, a public-choice dynamic sets in: Why hold back on the sidelines while other states empty the piñata? Thus even reputedly conservative state attorneys general came to join the tobacco litigation, fearful perhaps of being blamed should a settlement enrich other states while they twiddled their thumbs.




The kicker is that lawyers on the attack don't have to win all, most, or even a sizable minority of the cases they file. They can in fact lose 15 in a row, and when they finally get lucky on the 16th they can demand a fortune in punitive damages based on the defendant's entire national course of conduct—never mind that the 15 earlier juries may have found that same course of conduct justifiable. In the famous McDonald's coffee burn case, a New Mexico jury awarded millions in punitive damages against the fast food chain in part to punish the company for its insensitivity in disputing numerous earlier claims of java-related injuries—though a major reason for its resistance was the prevailing sense among lawyers that juries were unlikely to assign liability for keeping takeout coffee hot.

In effect, our liability system has emerged as a kind of firing squad, in which the great majority of juries may aim their rounds harmlessly into the air, declining to view the defendants as worthy of execution, but which is fatal all the same if just one or two of the sharpshooters point as they're told. One result of firing squad liability is utterly to foil the policy of states that would have preferred to be more lenient on an issue. I'm writing these words on a frigid March day in New England, where many of us would be glad to assume the risks of hot takeout coffee, knowing how tepid it can get by the time we consume it after a drive to our destination. But that's not a matter we get to decide for ourselves any more; a New Mexico jury has decided for the whole country.

In much the same way, the gun suits invite Northeastern juries to punish gun makers for not imposing on sales in South Carolina a range of vague requirements that would be found quite unpalatable there, including an anti-smuggling equivalent of "know your customer" rules (to borrow a term from the recent banking controversy) and a completely new requirement that gun makers somehow refrain from fulfilling orders from the Palmetto State if doing so would result in "oversupplying" local buyers, the alternative presumably being to put dealers on allocation even if it leaves their shelves bare by July.

Thus can a few local legal cultures run roughshod over the rest of the country's right to local autonomy. In a rational world, attempts to invoke State A's law to ban gun sales in State B would be greeted by the same astonishment as an attempt by Mississippi legislators to regulate the closing hours of Louisiana saloons, or a resolution by the legislature of Uruguay decreeing the abolition of the British monarchy. Gun control advocates would be forced to get in line with the rest of us who have to actually petition the U.S. Congress when we want a new law passed controlling what people do in other states.

What can be done at this late stage? Presumably the Supreme Court could awaken from its slumber and begin reasserting defendants' old due process rights, but no one expects that any time soon. Some libertarians talk as if the U.S. Congress lacks much rightful authority to regulate the doings of state courts. Yet Article IV, Section 1 of the U.S. Constitution grants exactly such a broad-ranging power: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, *and the effect thereof.*" (Emphasis added.) In other words, the Framers gave Congress explicit authority to stipulate the manner in which states must accord due effect to other states' legislation, including in this case the legislative policy of states which choose to provide relatively liberal access to the means of self-defense.

So before the next Brooklyn jury punishes the next gun maker for its sales in some Southern state, it would seem completely in accord with the Framers' intent for Congress to lay down a few ground rules aimed at ensuring that some jurisdictions' laws do not slight the legitimate operation of others'. One promising idea was sketched a decade ago by law professor Michael McConnell, now at the University of Utah: a federal statute generally requiring state courts, when they rule on lawsuits arising from product sales elsewhere, to apply the law of the state where the sale took place. (The essay appears in a 1988 book I edited, *New Directions in Liability Law*, published by the Academy of Political Science.)

In the meantime, the spokesmen for the litigation lobby will be doing their best to keep up their absurd pose as guardians of federalism. There's no reason for us to let them. ◆

*Contributing Editor Walter Olson (hambo @mags.net), a senior fellow at the Manhattan Institute, wrote at length about the problems of jurisdiction and choice of law in* The Litigation Explosion *(Plume).*

CHIP BOK

# High Anxiety

By Jacob Sullum

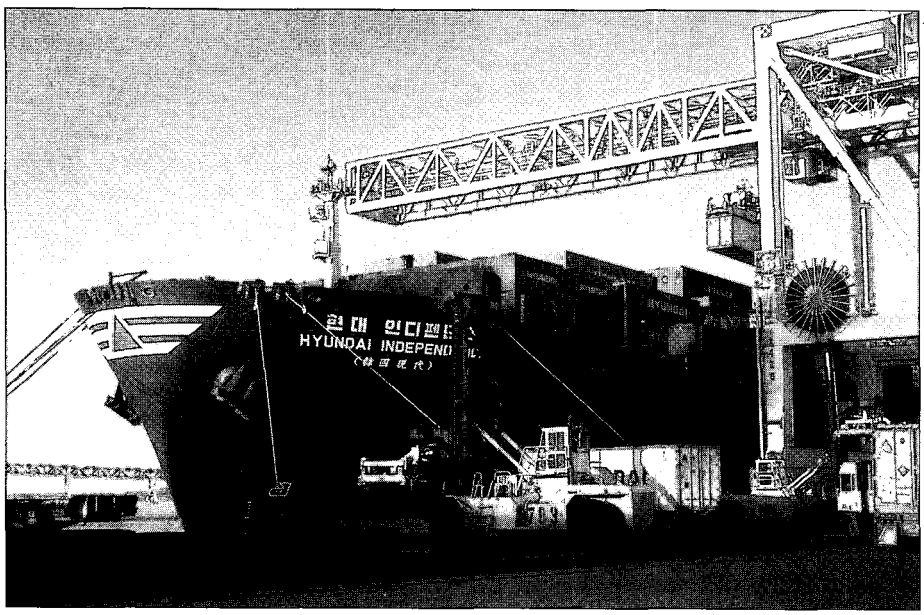
**Drug Crazy: How We Got Into This Mess and How We Can Get Out, by Mike Gray, New York: Random House, 251 pages, $23.95**

**Marijuana Myths, Marijuana Facts, by Lynn Zimmer and John P. Morgan, New York: Lindesmith Center, 241 pages, $13.95 paper**

Toward the end of *Drug Crazy,* Mike Gray takes us to the port of Los Angeles, where shipping containers from all over the world, carrying car parts, compact disc players, rattan furniture, and who knows what else, are transferred from enormous vessels to trucks. This is one of more than 300 ports of entry into the United States. "Los Angeles alone will land 130,000 containers this month," Gray writes. "Customs inspectors will examine 400. The other 129,600 will pass through without so much as a tip of the hat....The entire annual cocaine supply for the United States would fit in just thirteen of those steel boxes. A year's supply of heroin could be shipped in a single container."

The image is worth remembering the next time a politician talks about "cutting off the flow of drugs," as if the only obstacle were a lack of resolve. The chief virtue of Gray's book, which includes some firsthand reporting but relies heavily on secondary material and does not offer much in the way of fresh analysis, is his ability to succinctly and vividly communicate the futility of prohibition. A screenwriter and director by trade, Gray has an eye for dramatic juxtapositions and telling details, along with a smooth narrative style that is rarely found in books about drug policy. As a result, *Drug Crazy* is more accessible, though less rigorous and thorough, than the scholarly work on which Gray draws. For a general audience, it is probably also much more persuasive.

Say you want to convince someone that "source control"—a euphemism for destroying drug crops and encouraging farmers to grow something else—will never have a substantial or lasting impact on the supply of cocaine. You could cite reports from the RAND Corporation, the General Accounting Office, and congressional subcommittees. Or you could recommend Gray's sixth chapter, "The River of Money," where he observes: "The coca plant...is almost indestructible. It will grow anywhere, including the sheer face of a cliff, and it will flourish in soil too poor to support anything else. It has built-in resistance to local bugs, and unlike tomatoes, rice, or beans—which have to be reseeded each season—a single coca plant can last forty years. Instead of one or two crops a year, you can harvest coca leaves every ninety days. As a farmer-friendly shrub, about the only thing that could beat *Erythroxylon coca* would be a money tree."




**High Odds: The United States has more than 300 ports of entry, notes Mike Gray. "Los Angeles alone will land 130,000 containers this month....Customs inspectors will look at 400....A year's supply of heroin could be shipped in a single container."**

Similarly, Gray drives home the enormous profits created by prohibition: "From farm to lab, it takes about 250 pounds of leaves, worth say $150, to make a pound of cocaine you can sell in the provincial capital for $1,500. But it is in the next step—getting it from the jungle to the streets of Cleveland—that the price takes a spectacular leap from $1,500 a pound to $15,000. This staggering profit reflects the risk involved in moving the product from factory to market." The profit margin for heroin is even bigger: "A kilo of coke worth $2,000 in Bogotá might bring $30,000 in Los Angeles, but the identical block of heroin—only $6,000 in Colombia—could go for $100,000 up north." It is hard to see how law enforcement agencies can stand between determined criminals and this kind of business opportunity.

Gray notes the temptations they face when they try. A Chicago detective asks him to ponder a scenario: "You walk in a room—you're making forty-five thousand a year—and there's a million dollars in cash, and the guy jumps out the window. Do you chase him? Or do you figure this is far enough?"

Prohibition breeds other kinds of corruption as well. Gray rides with a group of cops who stop six black teenagers for no particular reason, verbally abuse them,

search them for drugs, find nothing, and let them go. After this episode, one of the cops turns to him and asks, "So what do you think the long-term sociological implications of this shit will be?"

Gray observes assembly-line justice on the night shift at the Cook County Courthouse, where he finds that police often misrepresent the circumstances in which they find drugs so the evidence will be admitted. "They lie, so we lie," one cop tells him. A public defender notes that most of these cases involve simple possession, "so you have a cop committing a greater felony [perjury] to convict a lesser felony. It's gotta have an impact on a cop to stand up and lie on a regular basis and think nothing of it."

Gray perceptively connects these routine violations to the motivation behind the Fourth Amendment, which grew largely out of anger at heavy-handed British efforts to locate smuggled goods. "In the drug war," he writes, "we have discovered what King George understood so clearly in the 1770s: it's practically impossible to catch buyers and sellers of contraband if you stick to the rules. The illegal transfer of goods between two people who are in agreement is a tough act to interrupt."

By exploring how drug law enforcement actually works, Gray demonstrates that prohibition is self-defeating, that it cannot achieve its official goal of "a drug-free America." He also shows that many people get trampled on the road to that ever-receding utopia. But this is not enough to persuade the public that we would be better off without prohibition. To do that, you have to assuage people's fears about what the world would be like if the government stopped trying to dictate the contents of our bloodstreams.

In this task, Gray is only partly successful. He highlights the bigoted hysteria underlying the Harrison Narcotics Act of 1914 and the Marihuana Tax Act of 1937: the talk of "numberless dope fiends," "cocaine niggers," marijuana-crazed Mexicans, and sinister Chinese luring white women into their opium dens. He shows how drug users were dehumanized, depicted as vampires who "infected everything they touched." Heroin was said to "transform the addict into a monster who has no control over himself and is compelled to spread his disease like Count Dracula."

Gray contrasts this image with a 1914 report from the city health officer of Jacksonville, Florida, who found that "a very large proportion of the users of opiate drugs"—more than 80 percent—"were respectable hard-working individuals in all walks of life." Gray observes: "While it may seem bizarre to read that narcotics addicts can hold down jobs and be useful, productive citizens, it turns out there is no scientific evidence to the contrary. In fact, the medical literature is filled with thoroughly documented records of addicts who functioned normally throughout their lives."

On the same page, however, Gray asserts that "a junkie, though starving, will trade food for dope." Later he uncritically repeats another prohibitionist article of faith: "Crack cocaine, of course, is an unparalleled menace." Since he does not bother to explain why, readers are left to imagine the worst.

**It's encouraging that defenders of prohibition are resorting to easily refuted arguments, which are so clearly aimed at explaining away the hypocrisy of politicians who want to arrest people for doing something they did with impunity.**

More fundamentally, Gray seems to endorse the disease model of addiction, which says drug abuse is a disorder that should be treated by medical professionals. The idea that heavy drug users suffer from a compulsive illness may encourage compassion rather than hostility, but it is not likely to reassure people who worry about the consequences of repealing prohibition. Although less sinister, the drug user as patient shares with the drug user as vampire one important characteristic: Neither can be expected to control his impulses. This assumed lack of responsibility is especially troubling when linked to Gray's suggestion that heroin "be given away to serious addicts."

Gray is more persuasive when he talks about marijuana, which he identifies as the "linchpin" of prohibition. "Take reefer out of the equation," he writes, "and the number of illegal drug users instantly drops from thirteen million to three million, and the drug war shrinks from a national crusade to a sideshow." People are often surprised to hear that marijuana is the main target of the war on drugs, accounting for more than two-fifths of drug arrests, but it could hardly be otherwise. Cannabis is by far the most widely used illegal drug: more than four times as popular as cocaine, more than 40 times as popular as heroin. Survey data indicate that about 70 million Americans, one-quarter of the population, have tried it.

The fact that so many of today's voters smoked pot when they were in high school or college creates a serious credibility problem for the government. "When they failed to experience the instant insanity that the authorities had promised," writes Gray, "it was for many an epiphany more powerful than the drug itself—the realization that the government makes stuff up....To bring these skeptics on board the war on drugs, it was necessary to convince them that the basic facts about marijuana had changed dramatically." Hence the ongoing propaganda campaign warning us that marijuana is 1) more dangerous than we used to think, or 2) more dangerous than it used to be.

In *Marijuana Myths, Marijuana Facts*, Lynn Zimmer and John P. Morgan carefully refute both of these claims. The book is divided into 20 chapters, each addressing a particular belief about marijuana illustrated by quotations from public officials or other sources sympathetic to prohibition. Zimmer, a sociologist at the City University of New York, and Morgan, a physician and professor of pharmacology at the CUNY Medical School, provide extensive references on topics such as addiction, brain function, pulmonary effects, highway safety, and marijuana use during pregnancy. Their meticulous, dispassionate, and concise summaries of the scientific literature make the book a useful primer and a valuable research guide.

Despite decades of research, Zimmer

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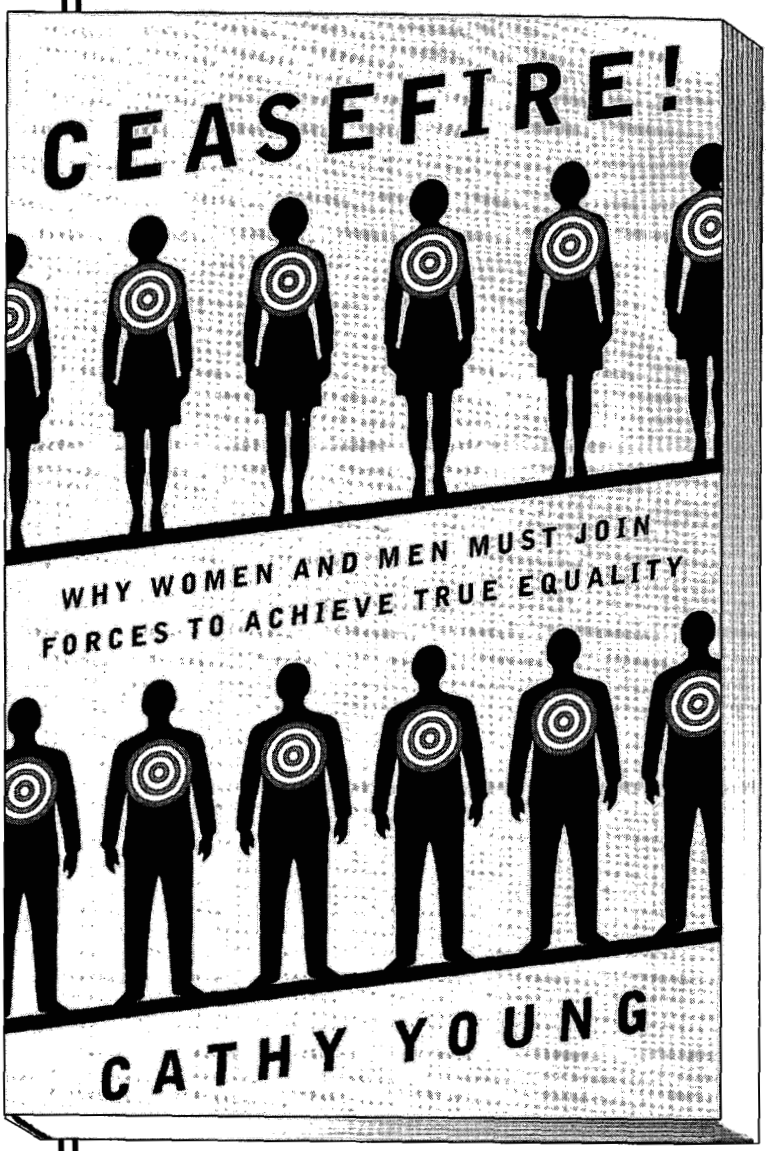


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and Morgan show, there is still little evidence of significant hazards associated with moderate marijuana use. The most serious health risk of heavy marijuana smoking is probably bronchitis. Lung cancer is possible in theory, but you'd have to smoke a hell of a lot to approximate the risk faced by the typical tobacco smoker.

Zimmer and Morgan also demolish claims about marijuana's psychological effects, including "amotivational syndrome." Their critique of the "gateway theory"—the idea that marijuana use leads to the use of more dangerous drugs—is particularly incisive. Prohibitionists are fond of saying that people who smoke pot are 85 times as likely to use cocaine as people who never try marijuana, which sounds like strong evidence for the gateway theory. But as Zimmer and Morgan note, "The 'risk factor' is large not because so many marijuana users experiment with cocaine, but because very few people try cocaine without trying marijuana first."

To show why it does not necessarily follow that smoking pot makes you more likely to snort cocaine, they offer an analogy: "Most people who ride a motorcycle (a fairly rare activity) have ridden a bicycle (a fairly common activity). Indeed, the prevalence of motorcycle riding among people who have never ridden a bicycle is probably extremely low. However, bicycle riding does not cause motorcycle riding, and increases in the former will not lead automatically to increases in the latter."

The book likewise makes short work of the argument that pot is more hazardous nowadays because it's much more potent than it was when Bill Clinton and Al Gore were toking up. First, claims of dramatic increases in THC content are based on faulty sampling and invalid comparisons. Second, even if average potency has risen, that would tend to *reduce* health risks, since people would smoke less to achieve the same effect.

Perhaps it's encouraging that defenders of prohibition are resorting to such easily refuted arguments, which are so clearly aimed at explaining away the hypocrisy of politicians who want to arrest people for doing something those lawmakers once did with impunity. The heated reaction of drug czar Barry McCaffrey and other federal officials to the medical marijuana movement—which threatens to undermine just one of the 20 myths that Zimmer and Morgan dissect—also suggests a certain desperation.

The Clinton administration's official justification for the marijuana status quo, as summed up by Secretary of Health and Human Services Donna Shalala, goes like this: "Marijuana is illegal, dangerous, unhealthy, and wrong." There's no denying that first part, and Zimmer and Morgan do an admirable job of discussing just how "dangerous" and "unhealthy" marijuana really is. But what does it mean to say that a plant is "wrong"? It seems to mean that no good can possibly come of it. To admit that anyone—even a cancer patient undergoing chemotherapy—could smoke pot and be better off as a result would be to admit that the federal government has been lying to the American people about marijuana for more than 60 years.

Like McCaffrey and Shalala, Gray sees medical marijuana as a grave threat to the war on drugs. "Prohibition, as a policy, can only ratchet in one direction," he writes. "Each failure must be met with more repression. Any step backward calls into question the fundamental assumption that repression is the solution....Marijuana is the pawl on the ratchet, the little catch that keeps the drum from unwinding....If somebody jiggles that pawl and the drum slips, support for the current policy will plummet like a loose cage in a mineshaft, because it cannot sustain a serious evaluation." I'm not sure he's right, but I like the metaphor. ◆

*Senior Editor Jacob Sullum (jsullum@reason.com) is the author of* For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health *(The Free Press).*

# Conservatism Without History

By Jonah Goldberg

**A Return to Modesty: Discovering the Lost Virtue, by Wendy Shalit, New York: The Free Press, 304 pages, $24.00**

It's been a very strange decade for the women's movement. It began with feminists lionizing the fictional Murphy Brown for having a baby without a husband. Now the equally fictional Ally McBeal has inspired *Time* to ask "Is Feminism Dead?" because she likes men, thinks sex is both fun and a big deal, and really wants to be married before she's a mother. When the '90s were young, Katie Roiphe made it big pointing out that radical feminists had largely concocted the date rape crisis. More recently, she wrote that sleeping with the boss is a winning strategy for can-do women. Naomi Wolfe has championed promiscuity but retreated somewhat on abortion; Camille Paglia has made a cottage industry out of celebrating kinky sex, pornography, and, most of all, herself.

And then, of course, there is the president's contribution. 1991 seems like an alien planet now, with feminists flaying an unmarried Clarence Thomas for asking an employee for a date. Eight years later, it's no big deal for the married commander-in-chief to have sex with an intern. Indeed, according to some feminist writers such as Jane Smiley writing in *The New Yorker*, Clinton's behavior simply reflected a human "desire to make a connection with another person." On *Meet the Press*, then-Sen. Carol Mosely Braun (D-Ill.), a woman swept into office by the backlash against Clarence Thomas, defended the president's behavior by observing, "Thirty years ago women weren't even allowed to be White House interns."

The only conclusion one can draw from all this is that the market for feminist commentary is as open as the definition of feminism itself.

Enter Wendy Shalit, author of *A Return To Modesty: Discovering the Lost Virtue.* Shalit has a lot in common with the decade's other feminist and anti-feminist newcomers. She's young. She's smart. And she believes in perhaps the only axiom to be passed down intact from the previous generation: "The personal is political."

Therein lies the twist. Rather than

claim, like some of her peers, that her catalog of one-night stands, unrequited lust, dysfunctional relationships, and sexual misadventures gives her the authority to dictate morality to others, Shalit asserts the opposite. Her moral stature derives from the fact that she doesn't put out.

A very recent graduate of Williams College, Shalit made her breakthrough with an article in *Commentary* about her horror at her dorm's introduction of coed bathrooms. From there, she garnered a reputation as a neoconservative *wunderkind*, with a billet at the *City Journal* in New York City. *A Return To Modesty*, her first book, represents the first major attempt to provide an intellectual framework for "True Love Waits" and the rest of the pro-virginity movement. Shalit offers a sustained defense of chastity, extolling the virtues of 19th- (if not seventh-) century social and sexual norms. Sex before marriage is an abomination, she declares. Even heavy petting is distasteful.

**Wendy Shalit ignores the essential insight of modern conservatives, from Burke to Disraeli: Ancient wisdom is a vital guide for reform, not a replacement for it.**

Recently, *The New York Observer* asked her if all this sounded a bit "neo-Victorian." She responded, "No, just Victorian." And why does Shalit want to return to the Victorian era? Because, she told the *Observer*, "I want to make things better."

That may be cute and provocative, but intellectually it is an absolute surrender to nostalgia. If Shalit had argued for the "neo," she might have had me. But I can no more live in Victorian England than I can join Star Fleet Academy.

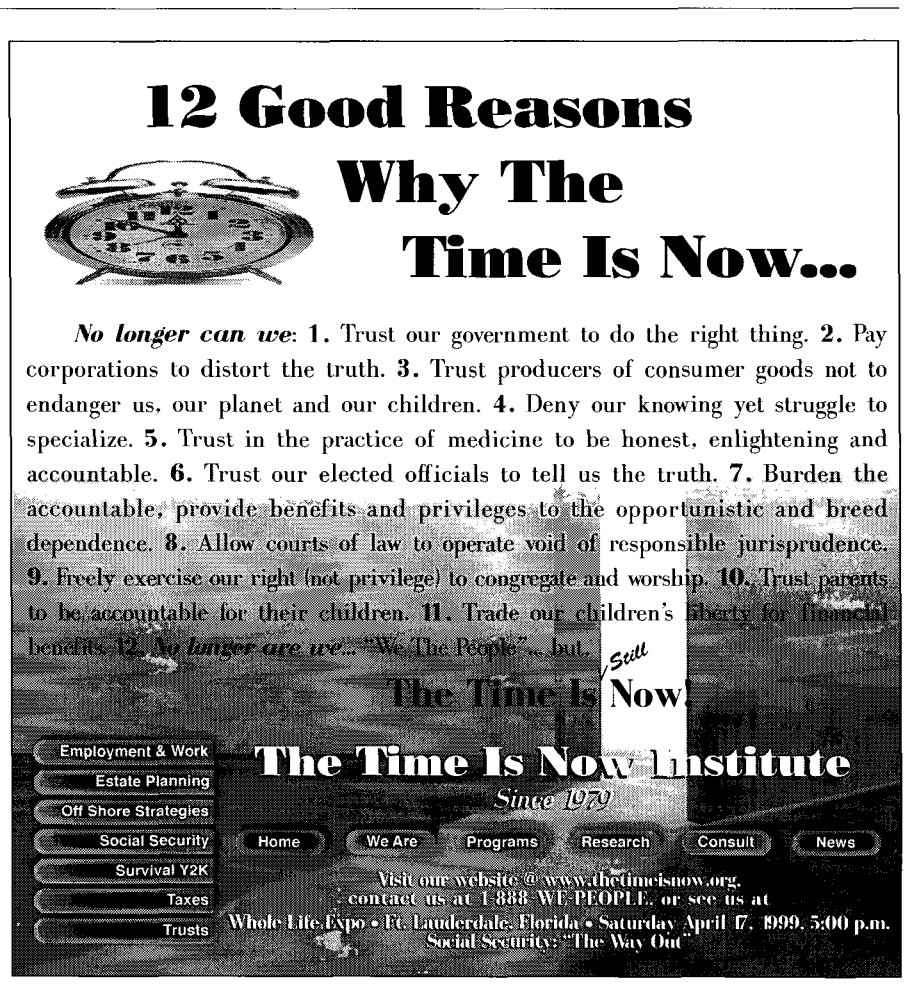
To be fair, if one holds Shalit's view of the world, things certainly couldn't get any worse, and 1850s England would be a welcome cultural harbor. Shalit may be the only writer around who believes both the sky-is-falling feminists *and* the we're-all-going-to-hell social conservatives. The left and the right have diagnosed different symptoms of the same social affliction, she argues. It's the remedies they've prescribed that are inadequate: "Girls who can't say no, anorexic girls, girls who are mutilating their bodies, girls who are stalked or raped, many who never see their fathers—and from the Left, the advice we get is, 'Whatever you do, don't be romantic,' and from the Right, 'Whatever you do, don't become a feminist.'"

It's left to Shalit to offer the magic elixir, the cure for what ails everyone: modesty. "It is no accident that harassment, stalking, and rape all increased when we decided to let everything hang out," she writes. "A society that has declared war on embarrassment is one that is hostile to women."

One could easily quibble here. One might dispute the way Shalit characterizes each faction's advice to young women, or point out that the data on stalking and self-mutilation are of a recent and unreliable vintage. But quibbles do not get to the heart of the problem with this book: For a conservative, Shalit has remarkably little appreciation for history. She may pine for an age of long skirts, quaint courtship rituals, modesty pieces, and Talmudic injunctions against touching, along with every other cultural barrier that ever has been erected between the sexes. But for all her love of the rituals of the past, she pays no homage to the historical contexts that created them.

For example: Shalit writes nostalgically about calling cards and their demise. She points out, correctly, that for most of Western history, people didn't want unmarried men and women to be alone together, even during courtship. Calling cards expedited the courting process without rocking the boat too much. A gentleman in pursuit of a young lady would drop off a card at her home to request a personal visit. If the woman declined the invitation, both she and her suitor would be saved face-to-face embarrassment.

Shalit loves this idea, and she doesn't seem to think there's any reason why we can't have it back. It has not occurred to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**Nostalgia Trip: Wendy Shalit pines for long skirts, quaint courting rituals, and injunctions against touching.**

her, apparently, that people used calling cards before we had this neat invention called the "telephone."

Calling cards were a small part of an ongoing social compromise with the rising middle class's increasing willingness to accept romantic choice. Arranged marriages were giving way to the insight that people should be able to select their spouse, or at least have some say in the decision. So elaborate dating rituals emerged, offering ways to pay tribute to tradition while still affording greater liberty in choosing a partner. We still use many of these rituals today, and some of the old traditions are gaining new strength. But Shalit seems unconcerned with all of this. Indeed, she likes arranged marriages too.

And she likes Richard Brathwait's *The English Gentleman* and *The English Gentlewoman,* dated 1630 and 1631 respectively. (According to Brathwait, "bashfull modesty" was a woman's ticket to salvation: "Modesty must be your guide, vertuous thoughts your guard, so shall heaven be your goale.") From Shalit's rendering, you might think Brathwait's interesting treatises are travel brochures for a cultural Shangri-la, a utopia to which we can easily return by clicking our heels or reading her book. The reality, of course, is that in the 1630s birth control was almost non-existent and reproduction mysterious. Women were often chattel; marriages were often arranged.

Shalit seems to think that if she can only explain why the olden days were better than today—*if only we could understand the things she does*—we could transform society overnight. But ideas neither last in a vacuum nor spring forth *ex nihilo.* Of course some values have eroded in the last century. But the cause of those changes cannot solely be found in the intellectual realm. The automobile probably did more to destabilize traditional values than Nietzsche did. One can argue with Nietzsche. But who, besides Al Gore, will argue with the car?

Shalit ignores the essential insight of modern conservatives, from Burke to Disraeli: Ancient wisdom is a vital guide for reform, not a replacement for it. Human nature, to borrow Glenn Loury's phrase, has no history. But institutions must have a history; if they do not change with the times, they die. If modern society suddenly adopted calling cards and modesty pieces, it would not enjoy an instant moral restoration. It would be hobbled with kitsch.

This might have been prevented if Shalit had researched her book more diligently. William F. Buckley has argued that the neoconservatives' great contribution to the American right was sociology: Where older conservatives had contented themselves with philosophical arguments, the neocons deployed data. But the younger generation of neocons seems to have given up on rigor. Shalit cites perhaps a thousand women's magazines and maybe five actual studies. Letters to *Marie Clare* may be interesting as anecdotes or as culture chaff, but intellectually they have the nutritional value of a styrofoam cup. She would have been better off exploring, say, sociobiology, a field rich in data that have a great deal to say about modesty.

She also might have been more wary of inconsistencies. In her introduction, she writes sweetly about the idea of fathers giving away their daughters at weddings: "What is really so terrible about 'belonging' to someone who loves you?" Thirty-five pages later she attacks a notorious 1976 British House of Lords case, *Regina v. Morgan,* as a symptom of the decline of modesty. There is a contradiction here, and she misses it.

*Regina* is a staple feminist anecdote. One evening a man got drunk with three of his buddies. He told them that his wife was really kinky and that she would love it if they each had their way with her. Intrigued, the men went back to his house, where they proceeded to take turns raping his wife. The Lords ruled that the men weren't really guilty of rape because they believed there was implied consent.

Shalit, rightly horrified, believes that old-fashioned notions of modesty would have prevented this episode. (Maybe, maybe not: I'm not convinced that such atrocities did not occur a century ago.) Nevertheless, she sees no tension between extolling a system that says a father can own and then give away a daughter and denouncing the view that once the husband takes possession of the woman he can do as he pleases with her. Paternal ownership and matrimonial ownership are of the same piece—historically, intellectually, theologically. In the Third World nations where these institutions still exist—China, India, Central Asia—fathers regularly sell their daughters. If the daughters are lucky, they're sold to a husband.

*A Return to Modesty* is engagingly written at times, and Shalit's style will doubtless be most effective where it will do the most good: among young women who fear they are alone in questioning Naomi Wolfe's paean to the "shadow slut." Some of Shalit's critics have derided her for being a prude, but that criticism is unfair. If she had partied like a hooker during fleet week, she would have been accused of hypocrisy and dismissed out of hand.

And, yes, Shalit is very bright. But her book is sophomoric in its overconfident ambition. It would be more persuasive if it were a bit more *modest.*

*Jonah Goldberg (jonahemail@aol.com) is a contributing editor and online columnist for* National Review.

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# In a State's Eye

By Jesse Walker

**Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed, by James C. Scott, New Haven: Yale University Press, 445 pages, $37.50**

Brasilia wasn't the first city to be designed by a small cadre of planners and built from scratch. But of all such efforts, it was the most absurd: a new capital in inland Brazil, constructed without regard for the country's present or past; a crowdless, cultureless monument not to the nation that built it but to an abstract idea of what a great city should be. It was conceived by Juscelino Kubitschek, Brazil's president from 1956 to 1961, whose home in the new city was dubbed the Dawn Palace. "What else will Brasilia be," he explained, "if not the dawn of the new day of Brazil?"

Brasilia lacks the public squares and corridor streets that dominate the nation's other cities. It has none of the flexible spaces that allow for a vibrant civic life, for barrio loyalties and neighborhood chauvinism, for street festivals and—ahem—spontaneous street demonstrations. Instead it contains huge concrete apartment buildings and gigantic, lifeless squares. It is a city with lots of open space and no crowds to fill it; a city, to quote James Scott's excellent *Seeing Like a State*, of "architectural repetition and uniformity. Here is a case where what seems like rationality and legibility to those working in administration and urban services seems like mystifying disorder for the ordinary residents who must navigate the city. Brasilia has no landmarks."

But it still exists, and people still live there; it does not rot in the jungle like an ancient ruin. It persists because it takes more to build a city than a few self-styled geniuses with a plan. You need construction workers, and they need places to live. The workers "soon squatted on additional land," notes Scott, "on which they built makeshift houses....By 1980, 75 percent of the population of Brasilia lived in settlements that had never been anticipated, while the planned city had reached less than half of its projected population of 557,000."

The Brasilia of the planners' dreams is an imaginary city, an abstraction poorly realized by the actual and imperfect urban landscape. Its concrete blocks and behemoth squares still stand, but they could not exist without a secret city to sustain them: the squatters' and ex-squatters' more anarchic settlements, the capital's shadowy double.

For Scott, a Yale professor of political science and anthropology, Brasilia symbolizes the hubris of "high modernism," the belief that experts can rationally design an optimal social order without regard for tradition or accident. The "simplifying fiction" of high modernism, Scott writes, "is that, for any activity or process that comes under its scrutiny, there is only one thing going on. In the scientific forest there is only commercial wood being grown; in the planned city there is only the efficient movement of goods and people; in the housing estate there is only the efficient delivery of shelter, heat, sewage, and water; in the planned hospital there is only the swift provision of professional medical services." The advantages of such simplifications are obvious. Indeed, planning of any kind would be impossible without them. The trouble begins when you mistake your simplification for the reality that you're simplifying—when, as the trendies used to say, you confuse the map with the territory, ignoring the much more complex order that your charts obscure.

Brasilia's unplanned shadow city represents something else, something Scott calls "mētis." Mētis is rooted in local knowledge and practical experience; it rarely turns up on the high modernists' maps and graphs. It is empirical, open-ended, and more interested in specific objects and events than in abstract categories. Mētis is concerned with this oak, not all trees; that patch of soil, not all potential farmland. It is not anti-scientific, and it will adopt the fruits of scientific research when they are appropriate. When colonists introduced crops from the New World to Africa, indigenous farmers quickly began


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growing those that fit local conditions. But they steadfastly resisted the colonists' efforts to wipe out the natives' time-tested agricultural techniques in favor of "scientific" models more appropriate for the plains of Kansas.

High modernism, unlike mētis, has a hard time incorporating knowledge discovered in other ways—especially knowledge that, in practical application, rejects the modernists' aesthetic preference for visual order. Few planners would care to admit that they might have something to learn from the Brazilian barrios or African tribes they rule. Or, to pick an example that's closer to home, the businesses they regulate. Or the workers they manage.

This is particularly true, Scott argues, if their high modernist plans and administrative order are buttressed by two other factors: an authoritarian state able to impose the plans and a supine civil society unable to resist them. It is such circumstances that allow such terrors as the Soviet and Nazi holocausts.

Mētis, by contrast, flourishes—well, everywhere, but especially in what Scott calls "nonstate spaces," areas outside the government's effective control, set off by geographic or cultural barriers. "A major objective of would-be rulers," he writes, "was to create and then expand state spaces by building irrigation works, capturing subjects in wars, forcing settlement, codifying religion, and so on." And, more deeply, by rendering those nonstate spaces and the people who live there legible to their bureaucratic overseers. Nomadic bands do not fit on high modernist maps, or even those of less hubristic administrators. Therefore, they must be settled. Rooted communities can also pose problems, with their inscrutable customs, mysterious languages, and opaque forms of property ownership. So they must be invaded, homogenized, and, if necessary, resettled.

Scott describes several examples of this process; one is the enclosure of common lands. Most "common" lands were, in fact, extremely complex property arrangements, in which different families' use rights were based on a multitude of local factors. (Such complicated interactions exist in the First World today as well, though we don't recognize them as such. It's not unusual, for example, to own the mineral rights to a piece of land without owning the surface rights. The common law allows all sorts of easements and rights-of-way that would not exist in a world of pure fee-simple ownership. A modern business can be owned by a large group of people with different levels of control over how the enterprise is managed, while those who run it from day to day—the managers and employees—have a set of contractual rights over the enterprise without exercising actual ownership.

**James C. Scott is ambivalent about markets, noting that they can standardize cultural diversity as surely as the state can. But there is a difference between institutions that evolve as communities trade with one another and institutions imposed by force from above.**

You can sell a single share but you can't exert much authority with it; you can't sell your job, but you can use it to exercise a lot of control.)

The people within the common lands understand local property tenure well. Outsiders have more trouble making sense of it, especially outsiders whom the locals would have a good reason to deceive. One of the biggest forces behind the compulsory enclosures, Scott argues, was the tax collectors, who wanted a more detailed and accurate map of who owned and owed what.

So before enclosure, people had a carefully specific, constantly evolving bundle of rights to the land. Enclosure meant the expropriation of those rights and the imposition of a system that was far more efficient from the tax collector's point of view than from the producer's. The new system was no less complex: It's just that


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the burden of the complexity fell on a different group's shoulders. The old system favored local knowledge. The new favored professional knowledge. Power shifted from those who knew the land to those who knew the law.

Now consider the Soviet collectivization of agriculture, a disastrous high modernist project that killed millions. Brilliantly, Scott casts this as another conquest of nonstate spaces—in this case, Russian peasant communities. The tillers had already thrown out their old overlords, seizing the land of the church and gentry and redistributing it within the pre-existing framework of the peasant commune. In other words, they had largely solved the old problem of feudal inequality without making themselves legible to outside authority. This may have been in line with the Bolsheviks' revolutionary rhetoric, but it didn't sit well with their revolutionary practice, which was committed to central planning, state building, and administrative order. (Scott devotes an interesting chapter to Lenin's theory of the vanguard party, comparing the revolutionary's high-modernist assumptions to some less authoritarian views of revolt.) Lenin legalized the peasants' land seizures but "had no doubt that peasant smallholdings must eventually be abolished in favor of large, socialized farms."

So Stalin launched what amounted to a war, replacing old villages with new collective farms designed along high modernist lines—a series of mini-Brasilias. The state assaulted the peasant way of life, confiscating harvests, eradicating old folkways, and killing its foes with impunity. The result was serfdom and starvation, a system devastating for the peasants but profitable for the Soviet elite, whose control of the countryside was now assured. (Of course, they didn't completely annihilate the peasants' informal institutions. Otherwise, all of Russia would have starved to death long ago.)

Lest readers assume that this had more to do with the moral deficiencies of Stalin than with the innate flaws of high modernism, Scott also discusses Julius Nyerere's efforts to "villagize" the population of Tanzania. Unlike Stalin, Nyerere was an undeniably well-meaning leader; he even hoped, initially, that his people would move into his so-called *ujamaa* villages of their own free will. But most Tanzanian tribesmen refused, for perfectly good reasons, to be settled. The voluntary program soon became compulsory: People were forced into the villages, the villages themselves lost their early autonomy, and thousands died.

AP / WIDE WORLD PHOTO

**Collective Failure: Under Stalin, the state assaulted the peasant way of life, confiscating harvests, eradicating old folkways, and killing its foes with impunity. The result was serfdom and starvation.**

None of this is to glorify traditional society, which contains many gross injustices of its own. But—and Scott does not explore this as much as he could have—the state is not necessarily the best means for redressing those injustices. Statism substitutes one form of inequality for another, leaving future generations to determine which poison was worse. But change can come from within the traditional community as well, by evolution or by revolution; or from the interaction of that community with the outside world, through trade and cultural exchange.

Traditional cultures, contrary to stereotype, are remarkably flexible and dynamic. They are constantly evolving, constantly examining, adopting, and discarding the tools and practices of other peoples. And they contain their own contentious divisions, sometimes leading to uprisings. Such revolts are capable of eliminating local injustices without also destroying the folkways that make the community resilient and strong. (The Russian peasants' revolution is a case in point.)

Scott is ambivalent about markets, noting that they can standardize cultural diversity as surely as the state can. But that's not necessarily a bad thing. There is a difference between institutions that evolve as communities trade with one another—the Law Merchant, standardized weights and measures, etc.—and institutions imposed by force from above. The latter are coercive and homogenizing. The former are more plural, more syncretic; they represent not the obliteration of local cultures but the evolution of those cultures over time.

Of course, "the market" can mean different things. Business interests often use the state to standardize things that the population would otherwise let be. The most obvious example of this is, again, compulsory enclosure. Enclosures continue to be imposed to this day in the Third World, where they are sometimes promoted as a "market reform." They have less to do with free action or free enterprise than with granting favored companies access to indigenous peoples' lands and the natural resources they contain; or to the natives' labor, as they are forced from their small plots or nomadic paths and compelled to eke out a living in a factory or on

a plantation.

The difference is those simplifying fictions. A mercantile state can get in the habit of seeing things through a market lens, eliminating informal institutions that can't be expressed in cash. Commerce itself need not do this: The point of trade is for people to satisfy their subjective needs through exchange, not to substitute exchange for those subjective needs.

That distinction sometimes seems lost on Scott, who at one point criticizes F.A. Hayek for treating markets as though they were "natural." I'm sure this book will find an audience among those opposed to virtually any international trade; John Gray, the conservative philosopher, has already endorsed it warmly, though with the proviso that he wishes it were harder on the global marketplace. To judge from a few off-the-cuff remarks in the book, Scott might be glad to oblige him next time.

No matter. Once one has distinguished high modernism from mētis, one can bend that distinction to any number of ideological ends. *Seeing Like a State* remains a tremendous achievement, easily one of the most impressive and important books of recent years.

*Jesse Walker (jwalker@reason.com) is associate editor of* REASON.

# It Takes a Militia

By Glenn Harlan Reynolds

**The Minuteman: Restoring an Army of the People, by Gary Hart, New York: The Free Press, 188 pages, $23.00**

The Framers of our Constitution had a fear of standing armies, and of governments backed by them, that one legal scholar calls "almost hysterical." A standing army of professionals, they were sure, would eventually do one of two things: agitate for foreign military adventures to keep itself employed, or turn against its civilian masters to create a military dictatorship. To these two political threats they added a third, moral danger: that citizens used to relying on professionals for the defense of their liberties would come to take their freedom lightly.

The Framers' solution was the militia, an armed body that included all citizens qualified to vote. Whites without property were also eligible for the militia, provided they were not felons, and so were some blacks. The Framers saw this broad-based military institution as a vital protection against tyranny. Politicians and professional military officers might betray the people, but the militia could not because it *was* the people. And although militiamen might lack the skills and training of full-time, professional soldiers, those defects would be offset by their vastly greater numbers and morale. Politicians might call out the militia to enforce the laws, but always with the risk that if the laws were unjust the militia might decide to sit things out, or even side with the opposition. Think of it as armed jury nullification.

The militia system also had an important moral component. By serving in the militia, a citizen said he was prepared to stand up for his rights, even at the cost of his life. Militia service brought together people from disparate social backgrounds and reminded them of their shared citizenship. It also bred a familiarity with military matters that helped to dispel the mystique of professional soldiers, an otherwise potent political tool of the establishment.

**Gart Hart makes a strong case for bringing back something very much like the classical militia in this post–Cold War era.**

Unfortunately, the militia system foundered on the twin rocks of public apathy and elite dissatisfaction. Of the two, the latter was more decisive. The militia system was designed to make foreign military adventures difficult, and it did. As recently as 1912, when the federal government tried to send state militia units into Mexico, the attorney general opined that such an order was unconstitutional: Militias could be called into federal service only in cases of invasion or insurrection, not in the service of quasi-imperial ambitions abroad. Earlier efforts to invade Canada had encountered similar difficulties. This problem, coupled with a jealousy from professional military men that dated back to the Revolutionary War, led to the replacement of the militia system with the National Guard, a federally controlled force far more amenable to superpower demands.

Although the National Guard is sometimes referred to as the modern-day militia, it is in fact a federal force, subject to the control of the president in almost the same fashion as regular troops. The patina of state control that remains is almost entirely cosmetic. As Yale law professor Akhil Amar writes: "Nowadays it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago any band of paid, semiprofessional part-time volunteers, like today's Guard, would have been called 'a *select* corps,' or '*select* militia'—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms." The statute books continue to reflect this distinction in vestigial form: Title 10, Section 311 of the U.S. Code declares that all military-age males, and some females, are members of "the unorganized militia of the United States."

All of this may come as a surprise to the average American, who, thanks to media stereotyping, probably associates the term *militia* with tax-protesting, bogus-lien-issuing wackos, and who may even think that the National Guard is the militia that the Constitution talks about. But the classical notion of the militia and the virtues of an armed citizenry have attracted the interest of modern academics. During the last few years, such well-known constitutional scholars as Amar, Robert J. Cottrol of George Washington University, Brannon Denning of Yale Law School, William Van Alstyne of Duke Law School, and Alan

Hirsch of Hartwick College have been sympathetically revisiting the old vision of the militia. Some of them have even concluded that it might be a good idea to consider bringing the classical militia back in some form.

To this number can now be added former senator and former Democratic presidential candidate Gary Hart, a founder of the liberal defense-intellectual establishment. Hart's latest book, *The Minuteman: Restoring an Army of the People,* makes a strong case for bringing back something very much like the classical militia, or perhaps the 20th-century Swiss version, in this post–Cold War era. Hart's argument deserves far more attention than it will probably receive if defense and foreign affairs elites have their way.

Hart opens by noting that our current military posture could be described as "Eisenhower's Nightmare": a military-industrial complex so politically and economically powerful that it has taken on a life of its own. It is Eisenhower's nightmare because the military-industrial complex that Eisenhower warned about was a creature of the Cold War, but its present-day version has survived the end of that struggle almost intact. Despite the oddity of a huge military establishment with no plausible superpower foes, this fact is rarely remarked upon. That is because almost everyone in a position to care, from members of Congress fighting military base closings to flak-jacketed journalists addicted to covering war zones, has an investment in keeping the money flowing. As Hart says, "this great machine grinds grimly, ineluctably onward, searching for villains, whether stone-throwing tribesmen or desert quacks, to justify its existence." (Compare this with what Framing-era writer Joel Barlow said about standing armies: "Thus money is required to levy armies, and armies to levy money; and foreign wars are introduced as the pretended occupation for both.")

Not only does this huge military establishment represent an enormous waste of money, Hart argues, it is also politically disastrous. As he notes, in language echoing the Framers: "A permanent standing military seeks causes for its continued existence and resources to maintain itself. A citizen army—an army of the people—participates in the debate as to why it exists, what threat it must repel, and how and where it may be used. For a democratic republic, there is a world of difference between these two institutions."

Hart takes the reader on an extended tour of modern warfare, laying out his thesis that warfare in the 21st century will be smaller in scale and more chaotic than has been typical in the 20th: more Bosnias, fewer Normandy invasions. His view on this subject is shared by many well-regarded military thinkers, which is not to say that it is necessarily right. War often manages to confound the experts' predictions. But technology seems to be pointing in the direction Hart suggests, with the implements of destruction becoming less expensive and more powerful, and with modern communications depriving huge integrated armies of the organizational


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advantages they once possessed. Hart's predictions may be wrong, but they are certainly plausible.

Hart's prescription represents a radical change. In short, he proposes a much smaller professional army, backed up by much larger reserve forces and, ultimately, by an entire population with military training. The professional army would provide a rapid-response force; the citizen force would provide the real muscle in any large war. The system might look very much like that used by the Swiss and outlined in Stephen Halbrook's *Target Switzerland* (see "Neither Nationalist nor Socialist," October). All citizens would undergo military training, followed by a short period of active duty and a lifetime of reserve status. And though Hart doesn't say this, if they follow the Swiss (and Israeli) approach, they will surely keep weapons and other equipment close at hand in their homes, making most "gun control" strategies toothless.

**Standing Guard: The contemporary National Guard is part of what Hart calls "Eisenhower's nightmare"—a self-perpetuating military-industrial complex.**

Hart's proposal is sure to provoke controversy, if not excoriations, within the military. Yet what is most interesting about his book is not his military doctrine but his political analysis. He devotes more space to the role of the military in a democratic republic than he does to matters of force structure, and his ideas are very close to those of the Framers. Though Hart does not view standing armies with quite the same degree of fear, he sees them as a genuine threat to freedom.

Like the Framers, Hart sees the danger as twofold: instrumental and moral. Again like the Framers, he regards the moral danger as more significant. Hart quotes military reformer John McAuley Palmer: "Standing armies threaten government by the people, not because they consciously seek to pervert liberty, but because they relieve the people themselves of the duty of self defense. A people accustomed to let a special class defend them must sooner or later become unfit for liberty."

On this point, Hart is clearly right. A citizenry accustomed to letting others protect it is unlikely to shoulder the other necessary responsibilities of freedom. Thus, leaving aside *Seven Days in May* scenarios of military takeovers, a large professional military poses a threat that should not be ignored. And with the danger of military coups now receiving attention from military professionals—and even sparking articles in mainline military journals—that possibility should not be dismissed out of hand.

Hart's book should prompt much discussion among libertarians. On the one hand, universal training and military service seem too much like conscription, which libertarians traditionally oppose. On the other hand, most libertarians seem to agree with the Framers that an armed citizenry is a potent defense against tyranny, and a system of the sort that Hart proposes would certainly make the nation immune to military coups.

A rogue president could, of course, call everyone up and thus put everyone under military discipline, but that is a power Bill Clinton already enjoys under the Constitution. Article 2, Section 2 makes the president commander-in-chief of the militia when it is called into national service; as noted above, by statute the militia of the United States is every able male (and some females) between 18 and 55. Under existing law, most people would be disorganized, disarmed, and in shock as they were told what to do by military professionals. Under a system like the one Hart envisions, by contrast, those people would be armed, trained, organized, and not at all in awe of the military profession. Which approach is more likely to preserve liberty?

The Framers thought the answer was obvious. They also didn't think that militia service was the same thing as conscription, any more than jury duty constituted conscription. Thus, I would suggest that whether Hart's suggestion is favored by libertarians should turn on whether his approach, as implemented, resembles the classical militia more than the contemporary National Guard. The key question on this point would seem to be whether the populace is armed all the time, not just in active service. Telling people to show up at the federal building "or else" may be conscription, but telling those same people to show up at the federal building "and bring lots of guns and ammunition" isn't likely to promote tyranny.

It's possible, of course, that things would work out the other way: that rather than harmonizing the military with society, an approach like Hart's would militarize society. This seems quite unlikely to me, but I claim no monopoly on wisdom. At the very least, however, Hart's proposal deserves discussion. When compared with our current system, which he correctly describes as a "nightmare" in terms of its financial cost and threat to liberty, an alternative based on the classical militia may have much to offer.

Hart's book is well-written and thoroughly anchored in both military and political realities. An America that followed his recommendations would probably be less apt to become involved in ill-considered foreign wars, more resistant to tyranny, and effectively impossible to invade. This prospect is reason enough to begin the national debate that Hart calls for. Whether that debate takes place will be an interesting test of whether Eisenhower's nightmare is coming to an end.

*Glenn Harlan Reynolds (reynolds@libra.law.utk.edu) is a professor of law at the University of Tennessee.*

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# Prosecutorial Abuse

## Reinventing the Independent Counsel Act for fun and profit.

By Thomas W. Hazlett

"It is my firm conviction that the law has been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level executive branch officials."

So spake Attorney General Janet Reno on May 14, 1993. She was announcing before Congress "that the [Justice] department and the administration fully support re-enactment" of the Independent Counsel Act. Spending $48 million to hunt down political opponents; issuing sensational indictments only moments before national elections; grilling the wives, lawyers, and ministers of key targets; attacking public officials in reports even when the evidence did not merit indictments; dragging investigations on and on for years—all the proud work of Lawrence Walsh as Iran-Contra special prosecutor—not a problem. "The Iran-Contra investigation, far from providing support for doing away with the act, proves its necessity," opined Reno.

It appears that the Clinton administration and other supporters of the independent counsel law have jogged a few miles down the Damascus Road. Yes, it's possible that a flash of lightning and a few words from the Almighty changed their minds. But a conversion experience this eye-opening has not been seen since *Sports Illustrated*'s swimsuit issue hit the library at Holy Innocents High. Archibald Cox, who gained fame when terminated as a prosecutor in Watergate, argued in 1975 that independence had to be guaranteed in a new law (eventually enacted in 1978). "The pressure, the divided loyalty are too much for any man," he said. "Some outside person is absolutely essential." Today, he disagrees, saying the law "contains more evils than benefits."

Fair enough—people learn from 21 years of experience. But what to make of Sen. Carl Levin (D-Mich.), an author of the 1978 act and a key supporter of reauthorization in 1982, 1987, and 1994? Despite such firm commitment, Levin has flipped. So has Georgetown law professor Susan Block, a once-staunch supporter of the statute, who now says: "With unlimited time, an unlimited budget, and a single purpose, the independent counsel can become fanatical and obsessive."

We've heard that before. In a 1988 dissent, Supreme Court Justice Antonin Scalia argued, "How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile." The losing plaintiff in that case, Theodore Olson, was an assistant attorney general hounded by a special prosecutor because of some memos he had written to Reagan administration officials regarding how they should respond to congressional requests for Superfund information. No indictment was brought, but Olson was left with $400,000 in unreimbursed defense costs. Pondering Olson's case and Scalia's logic, 22 senators did vote against the independent counsel statute when it came up for reauthorization in 1994. But the champions of the "most ethical administration in history" were decidedly not among them.

**One-time supporters of the independent counsel law have jogged a few miles down the Damascus Road.**

We understand the back and forth of politics, but what is also on display in this tidy episode is the short-circuiting of the policy feedback loop. In most institutions of social life—your job, your family, your basketball team—proposing a Great Scheme puts the idea's creator on the spot: If the thing works, you're a hero; if it's a bust, you're a pinhead. Heroes enjoy perks which pinheads do not. Markets are particularly effective—and ruthless—in meting out rewards and inflicting punishments.

In the policy world, however, those whose schemes lead to Great Destruction —even by their own admission—routinely *benefit* from the debacle. Let's go to the videotape! See the leaders who crafted the Independent Counsel Act? There they are, noisily baiting a bear cub escaped from their own cave: Ken Starr. (Bless his soul, Starr argued *against* the act before he was appointed under its auspices.) There they are, pledging to end this *partisan* travesty. There they are, leaders of foresight and courage, now saving America from out-of-control prosecutors appointed under their own law!

It's the public policy version of one-stop shopping. Those who manufacture the problem sell you their solution. When a policy flops—hey, who better to peddle the next sure-fire fix? The marketing campaign is impressive and well-established: congressional hearings, press conferences, cable talk shows, the televised speech on C-SPAN.

Most important, it doesn't require any admission of past mistakes. You just denounce last year's model as defunct and bravely announce the next product cycle. Indeed, there's money in it: White House fund-raisers boast that, driven by Starr hate, $5 million poured into "Save the Big He" coffers in 1998. Just one more year of that revenue level means Bill Clinton will profit from the Whitewater special prosecutor. *Sign a bad law? Get a check.*

The fuse in our feedback loop is blown. And that's what is truly out of control in our policy-making structure.

*Contributing Editor Thomas W. Hazlett (hazlett@primal.ucdavis.edu) is an economist at the University of California at Davis and a resident scholar at the American Enterprise Institute.*

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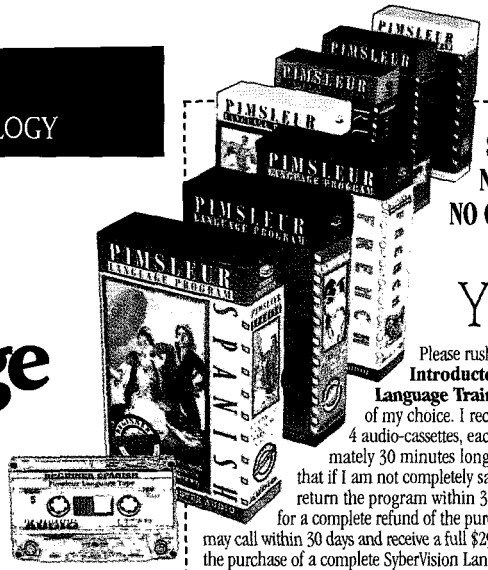


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